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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. [illegible]

PHILADELPHIA BAR ASSOCIATION

JAMES VANCE ET AL., APPELLANTS,

vs.

A. R. BURBANK ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED OCTOBER 14, 1878.

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1 In the circuit court of the United States for the district of Oreg

JAMES VANCE, LOUISA J. VANCE, LIVY SWAN, and ALMEDIA SWAN, complainants,
vs.
A. R. BURBANK, DANIEL JOHNSON, THOMAS Heuston, Bartlett Whitlow, J. M. Belcher, M. J. Bird, R. P. Bird, John Bird, Jacob Grazier, J. L Ferguson, Harrison Allison, J. J. Butler, E. C. Bradshaw, Hull Johnson, James A. Campbell, Jesse Dixon, L. A. Dixon, J. W. Dunn, C. F. Royal J. W. Watts, K. B. Mercer, Josiah Nelson, Robert Bird, W. F. Perkins, Geo. M. Perkins, G. W. Perkins, E. D. Perkins, A. H. Roberts, Matthew Patton, Aaron Frazer, Joseph Heuston, H. Hurley, and the County of Yamhill, defendants.

To the honorable the judges of the circuit court of the United States for the district of Oregon:

Your orators, James Vance, Louisa J. Vance, Livy Swan and Almedia Swan, humbly complaining, show unto your honors that they, your orators, are citizens of the State of California and all the defendants are citizens of the State of Oregon and the defendant the county of Yamhill is a municipal corporation in said State of Oregon. That your orator Louisa J. Vance is and has been ever since prior to the year 1866 the wife of your orator James Vance, and your orator Almedia Swan is and has been ever since prior to the year 1866 the wife of your orator Livy Swan.

That heretofore, to wit, on the 20th day of July, 1848, one Lemuel Scott, who was a white male citizen of the United States, over twenty-one years of age, and a married man, was a settler upon and claimant of a tract or parcel of public lands in the Territory of Oregon, bounded as follows: Commencing at a point 9.64 chains south and 8.12 chains east of the northwest corner of section 5, in township 4 south, range 3 west of Wallamet meridian, as said corner of said section was established by the United States serveys subsequently made (the United States surveys not having been, at said date of July 20th, 1848, extended over said lands); and running thence west 53.35 chains; thence south 38.50 chains; thence due west to a point 9.50 chains west of the range line between ranges 3 and 4 west of Wallamet meridian; thence due south to a point 13.39 chains south of the line between sections 1 and 12, in township 4 south, range 4 west; thence east 62.25 chains; thence north 23 degrees east 21.50 chains; thence north 85 degrees east 5.17 chains; thence north 23 degrees east 39 chains; thence east 28.25 chains; thence north 23 chains; thence west to the place of beginning, containing six hundred and forty (640) acres; which said tract of land is hereinafter designated, for convenience of reference, as the Lemuel Scott claim. That said Lemuel Scott settled upon and became a claimant of said land under the laws of the provisional government of said Territory of Oregon, and that he resided upon and cultivated said land from the said 20th day of July, 1848, continuously for more than four successive years thereafter, and until the month of February, 1861; and that during all that time the residence upon, and possession and cultivation of, said

land by said Lemuel Scott were open, visible, notorious, and well known.

2 Your orators further show that Mary Jane Scott was the wife of said Lemuel Scott, and was living with him on said land on the 20th day of July, 1848, and so continued until the 9th day of April, 1851, when she died, leaving three children, namely, your orator Louisa J. Vance, then Louisa J. Scott, aged 5 years, your orator Almedia Swan, then Almedia Scott, aged one year, and Caroline Scott, aged 3 years.

Your orators further show that on the 9th day of October, A. D. 1852, and within three months after the said land was surveyed by authority of the United States, the said Lemuel Scott duly notified the surveyor-general of the said Territory of Oregon of the precise tract of land so settled upon by him, claiming the same as a donation land claim under the act of Congress entitled "An act to create the office of surveyor-general of the public lands in Oregon, and to provide for the survey and to make donations to settlers of the said public lands," approved September 27th, 1850, and commonly called the donation law; and the surveyor-general then and there, in presence of said Lemuel Scott, entered a diagram or map of said tract so notified upon, on the township plat of the townships in which said land was situated.

That on the said 9th day of October, 1852, the said Lemuel Scott made and presented to the surveyor-general final proof that he had resided upon and cultivated said tract of land for four consecutive years from and after said 20th day of July, A. D. 1848, as aforesaid, and had, in all respects, complied with the requirements of said donation law, so as to entitle him to said lands, one-half thereof to himself and the other half to his said wife or her heirs, and that he then demanded of the said surveyor-general that he issue the certificate of proof of compliance with the law, and that he designate the part of said land enuring to the said Lemuel Scott, and that part enuring to the said Mary Jane Scott, his wife.

Your orators further show that on the 8th day of October, A. D. 1852, the day next preceding that on which the said Lemuel Scott made and presented his said proof of residence and cultivation, one Joel Perkins, a married man, filed with the said surveyor-general a notification as claimant under the said donation law, of a tract of land of 640 acres, embracing and including that part of the said Lemuel Scott claim lying within the following boundaries, to wit, commencing at a point 9.50 chains west and 13.39 chains south of the northeast corner of section 12, in townships 4 south, range 4 west of Wallamet meridian, and running thence east along the south line of said Lemuel Scott claim 62.25 chains, to the southeast corner thereof; thence north 47 chains; thence north 64 degrees west, to the intersection of such line with the west line of said Lemuel Scott claim; thence south along the line of said Lemuel Scott claim 12.75 chains to a northwest inner angle of said Lemuel Scott claim; thence west along the boundary of said Lemuel Scott claim, to a point 9.50 chains west of the range line between townships Nos. 3 and 4, west of Wallamet meridian; and thence south to the place of beginning; which land so embraced and included in said notification of said Joel Perkins and also in the said Lemuel Scott claim, is hereinafter, for convenience of reference, designated as the Joel Perkins tract; and that because of said filing of notification by said Joel Perkins, the said surveyor-general declined to grant the said certificate of settlement, residence, and cultivation to the said Lemuel Scott, or to make the designation of the part of said Lemuel Scott claim which should enure to said Lemuel Scott and the part which should enure to his said wife, there being

by said filing of notification by said Joel Perkins a conflict between the claim of said Lemuel Scott and the claim of said Joel Perkins.

Your orators further show that on the day of May, A. D. 1850, the probate court of Yamhill County, acting as a board of court
3 commissioners, claiming to act under the act of Congress approved May 23d, 1844, commonly called the town-site law of 1844, and claiming the right to enter under the provisions that act, caused a survey and plat to be made of a part of said lands heretofore described and embraced within both the said notification of Lemuel Scott and the said notification of the said Joel Perkins, and which part so surveyed by the said probate court is more particularly described and bounded as follows:

Commencing at the same point hereinbefore specified as the beginning point in the description of the said Joel Perkins tract, and running thence east along the south line of the said Lemuel Scott claim 29.50 chains; thence north 29.80 chains; thence west 29.50 chains to the west line of said Lemuel Scott claim; and thence to the place of beginning; which land included with the said survey by the probate court, and within the said Lemuel Scott claim, and within the said Joel Perkins tract, is hereinafter for convenience of reference designated as the Town-site Tract; and afterwards, on the 19th day of April, 1858, the county commissioners of said county of Yamhill, having previously obtained permission from the Commissioner of the General Land Office therefor, entered the land so surveyed, embracing said town-site tract, at the land office at Oregon City, as a town-site, under said town-site law of 1844; and that the town of Lafayette, in said county, is located on the tract so entered.

Your orators further show, that on the 23d day of August, A. D. 1853, in order to settle and adjust the dispute and conflict which had arisen between said Lemuel Scott and said Joel Perkins, in consequence of the said Joel Perkins having included in his land claim as aforesaid a part of said Lemuel Scott claim, the said Lemuel Scott and Joel Perkins entered into an agreement with each other, whereby the said Lemuel Scott agreed to relinquish unto the said Joel Perkins all the right and claim which he, the said Lemuel Scott, then had to or upon any of the aforesaid lands lying within the said notification of the said Joel Perkins, and west or south of a certain line then and there agreed to and pointed out by and to each other by the said Lemuel Scott and Joel Perkins, they going together over and upon said lands for the purpose of locating said line; that said line agreed upon by them commenced at the point where the north line of the said notification of said Joel Perkins intersects the west line of the said Lemuel Scott claim, and ran thence south to the south line of said Lemuel Scott claim, and thence east to the southeast corner of said Lemuel Scott claim; and the said Joel Perkins by said agreement agreed to relinquish unto the said Lemuel Scott all of said lands lying east and north of said agreed line; that on the same day they attempted to reduce said agreement to writing, and that said Joel Perkins then represented that he knew and had correct information as to the courses, bearings, and distances by which to describe and locate said agreed line, by referring to and connecting it with the public surveys, and represented that a line commencing at a point 9 chains south and 32.50 chains west of the northwest corner of section 5 in townships 4 south, range 3 west, and thence projected south 78.50 chains, and thence east to the west line of John Bird's donation claim, would fall upon, and coincide with, the line so agreed upon; and that said Lemuel Scott,

having no knowledge of the courses, bearings, and distances to connect said agreed line with the public surveys, but relying wholly upon the said representations of the said Joel Perkins, and supposing them to be true and correct, executed jointly with said Joel Perkins an instrument of writing purporting to be an agreement upon a line for the settlement and adjustment of said conflict, in which instrument said line was described and connected with the public surveys by the numbers, courses, bearings, and distances given and stated by the said Joel Perkins as aforesaid; but that in fact said representations of said Joel Perkins, as to said courses, bearings, and distances, were wholly false, and were made with the intention and for the purpose, as your orators are informed and believe, of deceiving said Lemuel Scott and of defrauding him and the said Caroline and your orators.

And your orators say that the line so described in said written instrument was not the line agreed upon between said Lemuel Scott and said Joel Perkins, but was 12.92 chains east of and parallel with the line so agreed upon, whereby there was included in the land described as relinquished to said Joel Perkins, as your orators are informed and believe, about 90 acres of land in the said Lemuel Scott claim which was not in fact relinquished, or to be relinquished, by said Lemuel Scott, under the agreement actually made, as aforesaid.

And your orators further show, that before said agreement was made, the said Lemuel Scott had completed his four years' residence and cultivation of and upon said Lemuel Scott claim, and had fully complied with the said donation law with relation thereto, but no patent or patent certificate had been issued for his said land claim; and that your orators, Louisa J. Vance and Almedia Swan, and said Caroline Scott, were the owners of three-eighths of said land in fee, and that said agreement was wholly and in all respects null and void and of no effect as to the interests and rights of your orators and the said Caroline Scott in and to the land so agreed to be relinquished to the said Joel Perkins, and that said agreement was wholly void and of no effect as to the interest of the said Lemuel Scott in the land so agreed to be relinquished by him, because said agreement was never in writing, and that the said written instrument was and is wholly null and void by reason of the said fraud and false representations of said Joel Perkins aforesaid, by which the said Lemuel Scott was induced to sign said writing, which was not the agreement actually made between the said Lemuel Scott and said Joel Perkins, and because the patent had not issued for said land; and your orators further show, that no change of possession, residence, or cultivation, or of other acts of ownership, was ever had, made, or done by said Lemuel Scott, to, upon, or about said 640 acres of land embraced in said Lemuel Scott claim, or any part thereof, in consequence of said fraudulent agreement or subsequent thereto.

And your orators further show, that shortly after said instrument of writing was executed as aforesaid, it having been executed in duplicate and each of the said parties thereto having a copy, it was orally agreed by and between the said Lemuel Scott and said Joel Perkins, that in order to carry said agreement into effect, said Lemuel Scott should send his copy thereof to John B. Preston, who was then surveyor general of Oregon, and that if the said surveyor general would allow the said Scott to change his notification so as to conform his boundaries to said agreement, it should be so changed, and in that case the said writing should be filed; but if the said surveyor general would not allow such change, then the said agreement was to be deemed

and taken as abandoned by the parties thereto, and was thenceforth to be entirely disregarded and held for naught; and that in pursuance of said last-named agreement the said Lemuel Scott did, on the 27th day of Aug'st, 1853, transmit his copy of said writing by mail to said surveyor general (he the said Lemuel Scott not having at that time discovered the said fraud of the said Perkins with respect to the location of said line), and that the said surveyor general refused to allow said change in the notification of said Lemuel Scott, and returned said instrument of writing to said Lemuel Scott in person, notifying said Lemuel Scott at the same time of his refusal to allow said change.

And your orators further show, that some time afterwards, and after the said John B. Preston had retired from the said office of surveyor general and another person had been appointed to said office and had entered upon the duties thereof, but the exact date your orators are unable to state, the said Joel Perkins wrongfully and fraudulently and without the knowledge or consent of the said Lemuel Scott, presented to the surveyor general who succeeded said John B. Preston his, said Perkins' copy of said instrument of writing, and caused the same to be filed with the said last-named surveyor general.

And your orators further show that on the 8th day of May, A. D. 1854, the said Joel Perkins, falsely pretending that he had resided upon and cultivated the land described in his said notification, including the land herein designated as the Joel Perkins tract, for four consecutive years, from and after the 30th day of June, 1849, went before the surveyor-general of Oregon and presented his affidavit, stating that he had settled upon said land on the 30th day of June, 1849, and had resided upon and cultivated the same continuously for four consecutive years, from and after said 30th day of June, 1849; and that on the said 8th day of May, 1854, the said Joel Perkins also procured one Daniel Johnson, his brother-in-law, and one E. Milliken, to make their affidavits to the same effect as his own affidavit above described, and presented the same to the said surveyor-general, along with his said affidavit and along with said instrument of date August 23d, 1853, fraudulently obtained from said Lemuel Scott as aforesaid, for the purpose of having the title to the said lands notified upon by him as aforesaid, granted to him by the United States, as a donation claim under said donation law, and for the purpose of having the patent certificate therefor issued to him, and for the purpose of obtaining a patent therefor from the United States under the said donation law; but your orators say that said affidavits were false and fraudulent, and were procured and made for the purpose of deceiving the officers of the land office of the United States, and for the purpose of defrauding the said Lemuel and Caroline Scott and your orators out of the said lands included within both said notification of said Joel Perkins and said Lemuel Scott claim; and your orators say that said Joel Perkins had not resided upon and cultivated said land or any part thereof for four consecutive years from said 30th day of June, 1849, nor for any four years continuously prior to said 8th day of May, 1854, and that he never did reside on or cultivate said lands or any part thereof for four consecutive years, and that said Joel Perkins was not residing upon said lands or any part thereof on said 8th day of May, 1854, when said affidavits were presented to the surveyor-general as aforesaid, and never did reside upon or cultivate the same or any part thereof, after said 8th day of May, 1854, and that said claim of said Joel Perkins to said land was wholly false and fraudulent; and that the said Daniel Johnson and said Joel Perkins, as your orators are informed and believe, conspired and confederated together to make

and procure said false affidavits, for the purpose of defrauding the United States, and said Lemuel and Caroline Scott and your orators, and securing the title to said Joel Perkins tract, and that although said claim was made in the name of said Joel Perkins as a donation claimant, the said Daniel Johnson was, as your orators are informed and believe, interested with said Joel Perkins in obtaining the title to said lands, and in the benefits intended to be derived therefrom, and in procuring and making said false and fraudulent affidavits and presenting the same to the said surveyor-general. And your orators further show that soon after the said false and fraudulent affidavits and said fraudulent instrument of writing were presented to the surveyor-general as aforesaid for final proof of residence and cultivation by said Joel Perkins on said tract, to wit, about the day of , 1854, and before the said Lemuel Scott knew or was informed of the filing or presenting of said false and fraudulent affidavits, or said fraudulent instrument of writing, said Joel Perkins left Oregon and never afterwards returned.

And your orators further show that on the 2d day of March, A. D. 1855, and soon after the said Lemuel Scott was first informed of the filing and presentation of said false and fraudulent affidavits and said fraudulent instrument of writing as aforesaid, the said Lemuel Scott
6 filed with the surveyor-general and register and receiver of Oregon a written protest or remonstrance against the allowance of said false and fraudulent affidavits as final proof of residence and cultivation of said Joel Perkins tract, by said Joel Perkins under said donation law, and against the granting of a donation certificate for said tract to said Joel Perkins; in which remonstrance or protest, the fact of said affidavits being false and fraudulent was stated; and the certificate for patent was granted in accordance with the said decision; and that subsequently, to wit, on the 14th day of March, A. D. 1872, as your orators are informed and believe, a patent was prepared and signed by the proper officers of the United States, purporting to grant the lands so notified upon by said Joel Perkins as aforesaid, unto the said Joel Perkins and his wife and their heirs respectively, the east half thereof, including a part of the said lands embraced in the notifications of said Joel Perkins and said Lemuel Scott, to the wife of said Joel Perkins and her heirs, and said west half thereof, embracing the remainder of said lands so included in both notifications, to said Joel Perkins and his heirs; but that said patent has not been delivered to the said patentees nor to any person or persons claiming said lands, but remains still in the hands of the officers of the land office of the United States and undelivered.

And your orators further show that said Lemuel Scott did not discover or know of the fact that said instrument of writing of date August 23d, 1853, did not correctly describe the line of division agreed upon between him and said Joel Perkins as aforesaid, or that said representations of said Joel Perkins upon which the description of said line was set forth in said instrument of writing were false until some time after the said 2d day of March, 1855, and had not discovered the said facts when he filed with the surveyor-general and register and receiver the said remonstrance or protest of March 2d, 1855, as aforesaid.

And your orators further show that on or about the day of November, A. D. 1859, the said Lemuel Scott received notice from the surveyor-general of Oregon that one Charles Handley had been appointed deputy surveyor of the United States, to make a final survey of the said Lemuel Scott donation claim, and that in pursuance of such notice said Lemuel Scott employed and paid said Charles Handley to

make the final survey of his said claim, and on or about the day of December, A. D. 1859, said Charles Handley did make said final survey, and did thereupon return his field notes of such survey to the office of the surveyor-general in accordance with the requirements of the law in relation thereto; and that thereupon the said Lemuel Scott, on the day of , 1860, made and filed with the register and receiver of the land office at Oregon City, further and additional, full and complete proof of his residence and cultivation of the said Lemuel Scott claim, and of the whole thereof, for the entire period from the said 20th 7 day of July, 1848, to the day of , 1858, and again demanded the issuance of the patent certificate therefor, for the entire tract of 640 acres, and the designation of the parts of said claim which should enure to him, and to the said Mary Jane Scott and her heirs, respectively; but the register and receiver then refused to issue said certificate or to make the division of said claim, on account of the afore said conflict with said Joel Perkins, and on account of the conflict between his, said Scott's claim, and the said town-site entry.

And your orators further show, that some time after the year 1866, but the exact date your orators have not ascertained, a pate't was issued to the county of Yamhill for said tract entered as a town-site as aforesaid, upon the trust specified in said town-site law of 1844, for the occupants thereof.

And your orators further show, that said Caroline Scott died intestate on the 28th day of August, 1864, in the State of Nevada, leaving the said Lemuel Scott her sole heir at law; and that said Lemuel Scott, on the 15th day of October, 1877, by his deed of that date, granted and conveyed unto your orators, Louisa J. Vance and Almedia Swan, as tenants in common, all his right, title, and interest of, in, and to all that part of said Lemuel Scott claim which is embraced and included within the said Joel Perkins tract, and all that part of the said Lemuel Scott claim which is embraced and included within the said town-site tract.

And your orators further show that the defendant A. R. Burbank is in possession of, and claims to own, under and through a chain of conveyances from the wife of said Joel Perkins, and under and through the said fraudulently procured donation by the United States to said Joel Perkins and wife, a tract of land lying within said Lemuel Scott claim, bounded as follows: Commencing at a point 320 feet south 17 degrees west from an iron stake which bears from a point 50 links north and 17.74 chains south 75 degrees east from the southwest corner of section 6, in township 4 south, range west of Wallamet meridian, and running thence south 17 degrees west 200 feet; thence west, at right angles, 220 feet; thence south to the south line of said Lemuel Scott claim; thence east along the said south line of said Lemuel Scott claim to the southeast corner of said Lemuel Scott claim; thence north 2½ degrees east along the east line of said Lemuel Scott claim to a point 5.72 chains south of the line between sections 6 and 7, in township 4 south, range 3 west of Wallamet meridian; and thence westerly, along the north side of the county road leading from the town of La Fayette to the town of Dayton, in said Yamhill County, to a point due north from the place of beginning; thence south to the place of beginning.

And your orators further show that the defendant Thomas Heuston is in possession of a tract or parcel of land lying within said Joel Perkins tract, and within said Lemuel Scott claim, described and bounded as follows: Commencing at a stake on a meridian line running 32.50

chains west of the northwest corner of section 5, in township 4 south, range 3 west, and being the northeast corner of a tract of land surveyed on the 19th day of September, 1877, by Charles Handley for Edgar Poppleton, and described in a deed executed by said Lemuel Scott and others to said Edgar Poppleton, bearing date the 6th day of October, 1877, and running thence north 29.06 chains to a stake for northeast corner; thence north 73 degrees west 20 chains to a stake; thence south 29 chains to a stake; thence east 3.50 chains to a stake; thence south to the line of the county road leading from La Fayette to Portland, and thence to the place of beginning, being part of section 6, in township 4 south, range 3 west, and containing 60 acres, more or less; and that said Thomas Heuston claims to be the owner of said
8 tract or parcel of land so possessed by him, under and through a chain of conveyances from the wife of said Joel Perkins, and through and under the said falsely and fraudulently procured donation by the United States to said Joel Perkins and wife.

And your orators further show that the defendant J. L. Ferguson is in possession of a tract or parcel of land lying within said Joel Perkins tract, and within said Lemuel Scott claim, described and bounded as follows: Commencing at a point being the southeast corner of a tract or parcel of land surveyed by Charles Handley, on the 19th day of September, 1877, for E. Poppleton, and described in a deed from Lemuel Scott and others to said E. Poppleton, bearing date the 6th day of October, 1877, and running thence west 13.46 chains; thence south 11.88 chains; thence south 74 degrees east 12 chains; and thence to the place of beginning, and containing 21 acres, more or less; and that said J. L. Ferguson claims to be the owner thereof through and under a chain of conveyances from the wife of said Joel Perkins, and through and under the said fraudulently procured donation from the United States to said Joel Perkins and wife.

And your orators further show, that the defendant Bartlett Whitlow is in possession of a tract or parcel of land lying within said Joel Perkins tract, and within the said Lemuel Scott claim, bounded and described as follows: Commencing at a point on the north side of the county road leading from said town of La Fayette to Portland, at the southwest corner of the tract of which the defendant Thomas Heuston is in possession, as hereinbefore described, and running thence north on the west line of said tract held by said Thomas Heuston; to a stake in an inner angle of the said tract held by said Thomas Heuston; thence west on the line of said tract held by said Thomas Heuston 3.50 chains to a stake; thence north 29 chains to a stake; thence north 73 degrees west 10.60 chains; thence south to the north line of said tract surveyed by Charles Handley for Edgar Poppleton, as hereinbefore stated; thence east to the northeast corner of said tract surveyed for said Poppleton; thence south with the line of said tract surveyed for said Edgar Poppleton 6.81 chains to the north side of the county road last aforementioned; and thence along the north side of said county road last aforementioned to the place of beginning; and that said defendant Bartlett Whitlow claims to be the owner of said tract of land so held by him through and under a chain of conveyances from the wife of said Joel Perkins and through and under said fraudulently procured donation from the United States to said Joel Perkins and wife.

And your orators further show, that at divers times heretofore the defendant The County of Yamhill, by its county court and county commissioners, has pretended to sell divers lots and blocks in said town of La

Fayette to other of the defendants, and to other persons, and has made deeds and conveyances thereof to such defendants and other persons; and that such other defendants are now in possession of said lots and blocks for which deeds and conveyances have been so made, as your orators are informed and believe, as follows: The defendant A. R. Burbank is in possession of lots three (3) and four (4), in block seven (7), lot three (3), in block forty (40), lot one (1), in block seventy-two (72), and lots one (1), two (2), and three (3), in block sixty eight (68), the defendant Thomas Heuston is in possession of lots three (3) and four (4), in block thirty-four (34), the defendant Daniel Johnson is in possession of lot six (6), in block six (6), lot three (3), in block thirteen (13), and lots three (3) and four (4), in block thirty-two (32), the defendant J. M. Belcher is in possession of lots one (1), two (2), three (3), five (5), and six (6), in block sixteen (16), and all of block forty-five (45), the defendant M. J. Bird is in possession of lot three (3), in block sixty-two (62), the defendant R. P. Bird is in possession of lots five (5) and six (6), in block fourteen (14); the defendant John Bird is in possession of lot four (4), in block fourteen (14), all of block twenty-seven (27), and lots one
9 (1), five (5), and six (6), in block forty-seven (47); the defendant Jacob Grazier is in possession of all of blocks thirty-five (35), thirty-six (36), and sixty-six (66), and lots four (4), five (5), and six (6), in block sixty-seven (67); the defendant Harrison Allison is in possession of lots one (1), two (2), four (4), and five (5), in block forty (40); the defendant J. J. Butler is in possession of lot five (5), block sixty-two (62); the defendant E. C. Bradshaw is in possession of all of block forty-one (41); the defendants Daniel Johnson and Jacob Grazier are in joint possession of lots one (1) and two (2), in block fifteen (15); the defendant Hull Johnson is in possession of the southwest thirty (30) by seventy-six (76) feet of lot six (6), in block six, being a rectangular piece of land thirty (30) feet north and south and seventy-six (76) feet east and west; the defendant James A. Campbell is in possession of lot four (4), in block nineteen (19), lot one (1) in block five (5), lot one (1) in block eight (8), and lot one (1) in block fourteen (14); the defendant Jessee Dixon is in possession of lots two (2) and five (5), in block seven (7); the defendant J. W. Dunn is in possession of lot four (4), in block thirty-one (31); the defendant C. F. Royal is in possession of lots one (1) and six (6), in block forty-two (42); the defendant J. W. Watts is in possession of lots one (1), three (3), four (4), five (5), and six (6), in block five (5), lots one (1) and three (3), in block six (6), and lots four (4), five (5), and six (6), in block seventy-two (72); the defendant K. B. Mercer is in possession of all of blocks forty three (43) and forty-four (44); the defendants Josiah Nelson and Robert Bird are in joint possession of the east thirty (30) by one hundred (100) feet of lot five (5), in block seven (7), being a rectangular piece of land thirty (30) feet east and west by one hundred (100) feet north and south; the defendants W. F. Perkins is in possession of lot two (2), in block (2); the defendant Geo. M. Perkins is in possession of lot six (6), in block thirteen (13); the defendant G. W. Perkins is in possession of lots three (3), four (4), five (5), and six (6), in block seventeen (17); the defendant E. D. Perkins is in possession of lots four (4) and five (5), in block (6); the defendant A. H. Roberts is in possession of lots one (1) and six (6), in block thirty six (36); the defendant H. Hurley is in possession of lots one (1), two (2), three (3), five (5), and six (6), in block thirty-one (31); the defendant Matthew Patton is in possession of lot four (4), in block twenty-one (21), and lot two, in block sixty-two (62); the defendant Aaron Frazer is in possession of lots two (2)

and three (3), in block sixty-eight (68); the defendant Joseph Heuston is possession of lot five (5), in block thirty-four (34).

And your orators show that each and all the lots and blocks so in possession of the said defendants, respectively, lie within said Joel Perkins' tract, and within said town-site tract, and within said Lemuel Scott claim, and that the said defendants so in possession thereof, as your orators are informed and believe, claim to be the owners of said lots and blocks so in their possession, the said Jacob Grazier and Daniel Johnson claiming to be tenants in common, in fee, of the land so in their joint possession, the said Josiah Nelson and Robert Bird claiming to be tenants in common, in fee, of the land so in their joint possession, and the said Jesse Dixon and the defendant L. A. Dixon, who is his wife, claiming to be seized in fee of said land so in his possession in right of the said L. A. Dixon, and the other defendants so in possession of lots or blocks claiming to be the owners thereof, respectively, in their own right; and that, as your orators are informed and believe, each and all of the defendants so in possession of lots and blocks, and claiming title thereto, derive their chains to such title from said county of Yamhill, and through and under said town-site entry, some of them by conveyances therefor immediately from said county, and others by chains of conveyances from said county through the other persons whom conveyances have been made as aforesaid; and that, as your orators are informed and be-
10 lieve, the said county of Yamhill has pretended to sell, and has made pretended conveyances of still other lots in said town of La Fayette and lying within said Joel Perkins' tract, and within said town-site tract, and within said Lemuel Scott claim; but your orators are not sufficiently advised to state to whom or for what other lots such conveyances have been made. And your orators are informed and believe that some of the defendants who are in possession of lots and blocks as aforesaid claim, in addition to their said claim of title under said county of Yamhill, and under said town-site entry, to have derived some right or title to such lots and blocks from and under the said fraudulently procured donation from the United States to said Joel Perkins by deeds from said Joel Perkins, or his wife or heirs; but your orators are not sufficiently advised to be able to state which of the defendants do claim to derive title or right from or under said fraudulently procured donation to said Joel Perkins, or the lots or blocks to or for which such title or right is claimed.

And your orators further show that the said defendant the county of Yamhill is in possession and claims to be the owner under said town-site entry upon the trusts specified in said town-site law of 1844, of all that part of said town-site tract excepting what it has pretended to sell and convey as hereinbefore stated, and which unconveyed portion amounts to about forty (40) acres, as your orators are informed and believe, but your orators are not sufficiently advised to be able state the exact amount thereof.

And your orators further show that, as they are informed and believe, the said Joel Perkins is dead; that his wife survived him; that all his heirs are over the age of twenty one years, and that his widow and heirs have all ceased to be interested in said Joel Perkins tract, or any part thereof, and have executed conveyances therefor to divers persons, under whom those of the defendants claim who claim to derive their titles or rights from the said fraudulently procured donation to said Joel Perkins as aforesaid; that neither the widow nor the heirs of said Joel Perkins have any interest in the event of this suit.

And your orators show that all the said claims of title or right to said

lands and every of them, by said defendants, are wholly unjust and inequitable; that said donation to said Joel Perkins and wife were and are wholly fraudulent as to the said Lemuel Scott and wife and your orators, and ought in equity to enure to your orators as the heirs of said Mary Jane Scott and as the grantees of said Lemuel Scott; that said town-site entry was wholly inequitable and wrongful, so far as it embraced said lands within said Lemuel Scott claim; that said Lemuel Scott was entitled in equity and justice to a patent certificate and patent for said Lemuel Scott claim long before said town-site entry was made; and that, as your orators are informed and believe, and so charge the fact to be, the defendants and each of them, and all the persons from and through whom they respectively claim to derive their titles to the land claimed by them as aforesaid, have at all times had notice and knowledge of the rights of the said Lemuel Scott and wife and of your orators, and of the said fraud, and of the compliance by said Lemuel Scott with the donation law aforesaid, and of the failure of the said Joel Perkins as aforesaid to comply with said donation law, and of the illegality and injustice of the said town-site entry.

And your orators further show that the value of the lands in controversy in this suit exceeds five thousand dollars.

Wherefore, the premises considered, and forasmuch as all the said acts, doings, pretenses, and claims of the defendants are contrary to equity and good conscience, and tend to the manifest wrong and injury to your orators, and forasmuch as your orators cannot have adequate relief save in a court of equity where matters of this nature are properly cog-
11 nizable and relievable, your orators pray the decree of this honorable court that the said donation to said Joel Perkins and wife is fraudulent as against your orators; that the said town-site entry and patent are wrongful and inequitable as against your orators; that all the claims of defendants and each of them to said lands lying within said Lemuel Scott claim, whether derived from said donation to said Joel Perkins, or from said town site entry are inequitable as against your orators; that the possession and title of said defendants, and each of them, of and to the lands aforesaid and every part thereof, are held in trust by the defendants respectively for your orators; that the defendants and each of them execute to your orators good and sufficient conveyances of the lands so wrongfully held and claimed by them respectively; and for such other and further relief as may seem meet with equity and good conscience.

And may it please your honors to grant unto your orators the most gracious writ of subpœna of the United States of America, to be delivered to the said A. R. Burbank, Daniel Johnson, Thomas Heuston, Bartlett Whitlow, J. M. Belcher, M. J. Bird, R. P. Bird, John Bird, Jacob Grazier, J. L. Ferguson, Harrison Allison, J. J. Butler, E. C. Bradshaw, Hull Johnson, James A. Campbell, Jesse Dixon, J. W. Dunn, C. F. Royal, J. W. Watts, K. B. Mercer, Josiah Nelson, Robert Bird, W. F. Perkins, Geo. M. Perkins, G. W. Perkins, E. D. Perkins, A. H. Roberts, Matthew Patton, Aaron Frazer, Joseph Heuston, H. Hurley, and the County of Yamhill, thereby commanding them, and every of them, at a certain day, and under a certain pain therein to be specified, personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand to and abide such order and decree therein as to this honorable

court shall seem meet with equity and good conscience, and your orators shall ever pray.

HILL, DURHAM & THOMPSON AND
THAYER & WILLIAMS,
Solicitors for Complainants.

A true copy of the original bill.
Dec. 24, 1877.

W. LAIR REID,
Of Solicitors for Complainants.

Filed December 24th, 1878.

R. H. LAMSON, *Clerk.*

12 *Subpœna ad respondendum.*

In the circuit court of the United States for the ninth judicial circuit, district of Oregon. In equity.

JAMES VANCE, LOUISA J. VANCE, LIVY SWAN, and Almedia Swan, complainants,
vs.
A. R. BURBANK, DANIEL JOHNSON, THOMAS Heuston, Bartlett Whitlow, J. M. Belcher, M. J. Bird, R. P. Bird, John Bird, Jacob Grazier, J. L. Ferguson, Harrison Allison, J. J. Butler, E. C. Bradshaw, Hull Johnson, James A. Campbell, Jesse Dixon, L. A. Dixon, J. W. Dunn, C. F. Royal, J. W. Watts, K. B. Mercer, Josiah Nelson, Robert Bird, W. F. Perkins, Geo. M. Perkins, G. W. Perkins, E. D. Perkins, A. H. Roberts, Matthew Patton, Aaron Frazer, Joseph Heuston, H. Hurley, and the County of Yamhill, defendants. } No. 386.

The President of the United States of America to A. R. Burbank, Daniel Johnson, Thomas Heuston, Bartlett Whitlow, J. M. Belcher, M. A. Bird, R. P. Bird, John Bird, Jacob Grazier, J. L. Ferguson, Harrison Allison, J. J. Butler, E. C. Bradshaw, Hull Johnson, James A. Campbell, Jesse Dixon, L. A. Dixon, J. W. Dunn, C. F. Royal, J. W. Watts, K. B. Mercer, Josiah Nelson, Robert Bird, W. F. Perkins, Geo. M. Perkins, G. W. Perkins, E. D. Perkins, A. H. Roberts, Matthew Patton, Aaron Frazer, Joseph Heuston, H. Hurley, and the County of Yamhill, greeting:

You and each of you are hereby commanded that you be and appear in said circuit court of the United States, at the court room thereof, in the city of Portland, in said district, on the first Monday of February next, which will be the fourth day of February, A. D. 1878, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein James Vance, Louisa J. Vance, Livy Swan, and Almedia Swan are complainants, and you are defendants, and further to do and receive what our said circuit court shall consider in this behalf, and this you are in no wise to omit under the pains and penalties of what may befall thereon.

And this is to command you, the marshal of said district, or your

deputy, to make due service of this our writ of subpœna, and to have then and there the same. Hereof fail not.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, affixed at Portland, in said district, this 27th day of December, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the United States the one hundred and second.

[SEAL.] R. H. LAMSON, *Clerk.*

Memorandum pursuant to equity rule No. 12 of the Supreme Court of the United States.

The defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainants' bill therein may be taken pro confesso.

Returned and filed January 10th, 1878.

R. H. LAMSON, *Clerk.*

(Indorsed:) No. 386. In the circuit court of the United States for the ninth judicial circuit, district of Oregon. In equity. James Vance et al. vs. A. R. Burbank et al. Subpœna ad respondendum.

13 UNITED STATES OF AMERICA,
District of Oregon, ss:

To all whom it may concern:

Know ye, that by virtue of the authority in me vested as marshal of the United States for the district of Oregon, I have appointed J. B. Crossen, of Wasco County, my special deputy, and I do hereby depute and authorize him to make due service and return of the foregoing and annexed process, being subpœna and copy of complaint in the case of James Vance et al. vs. A. R. Burbank et al., and the said service having been duly completed, this appointment to terminate.

Witness my hand, at Portland, in said district, this 3d day of Dec., A. D. 1877.

A. W. WATERS,
United States Marshal, District of Oregon.

14 DISTRICT OF OREGON, *ss:*

In obedience to the command of the within writ, I have served the same upon the therein named County of Yamhill, by exhibiting same to Ellery Rogers, clerk of said county, and by delivering to Ellery Rogers, said clerk, personally, a true copy thereof, duly certified to by me as U. S. marshal of said district, together with a copy of the complaint in the within , duly certified to by the clerk of the court of said district, at Lafayette, in said district, on the 27 day of December, A. D. 1877.

ABNER W. WATERS,
U. S. Marshal,
By W. P. BURNS, *Deputy.*

14*a* DISTRICT OF OREGON, *ss:*

In obedience to the command of the within writ, I have served the same upon the therein named J. M. Belcher, by exhibiting same to him, and by delivering to him, personally, a true copy thereof, duly certified to by me as U. S. marshal of said district, together with a copy

of the complaint in the within , duly certified to by the clerk of the court of said district, at Portland, in said district, on the 29 day of December, A. D. 1877.

ABNER W. WATERS,
U. S. Marshal,
By W. P. BURNS, *Deputy.*

14*b* DISTRICT OF OREGON, *ss:*

In obedience to the command of the within writ, I have served the same upon the therein named James A. Campbell, by exhibiting same to him, and by delivering to him, personally, a true copy thereof, duly certified to by me as U. S. marshal of said district, together with a copy of the complaint in the within , duly certified to by the clerk of the court of said district, at The Dalles, in said district, on the 2d day of January, A. D. 1878.

ABNER W. WATERS,
U. S. Marshal,
By J. B. CROSSEN,
Special Deputy.

14*c* DISTRICT OF OREGON, *ss:*

In obedience to the command of the within writ, I have served the same upon the therein named Matthew Patton by exhibiting same to him, and by delivering to personally a true copy thereof, duly certified to by me as U. S. marshal of said district, together with a copy of the complaint in the within , duly certified to by the clerk of the court of said district, at his residence near Oswego, in said district, on the 4th day of January, A. D 1878.

ABNER W. WATERS,
U. S. Marshal,
By W. P. BURNS, *Deputy.*

15 DISTRICT OF OREGON, *ss:*

In obedience to the command of the within writ, I have served the same upon the therein named A. R. Burbank, Daniel Johnson, Thomas Hueston, Bartlett Whitlow, M. A. Bird, R. P. Bird, John Bird, Jacob Grazier, Harrison Allison, E. C. Bradshaw, Hull Johnson, Jesse Dixon, L. H. Dixon, J. W. Dunn, C. F. Royal, J. W. Watts, Josiah Nelson, G. M. Perkins, G. W. Perkins, E. D. Perkins, Joseph Hueston, and H. Hurley, by exhibiting same to each of them personally, and by delivering to each of them personally a true copy of the same, together with a copy of the complaint in the within action, at Lafayette, in said district, on the 27th day of December, 1877, and upon the therein named W. F. Perkins, by delivering to a member of his family, a person over the age of 14 years, at his residence, in Yamhill County, in said district, a true copy of the same, together with a copy of the complaint in the within action, on the 28th day of December, 1877; and upon the therein named K. B. Mercer, Nelson Roberts and Aaron Frazier, by delivering to a member of their respective families, persons over the age of 14 years, at their respective places of abode, in Lafayette, in said district, a true copy of the
16 same, together with a copy of the complaint in the within entitled action, on the 27th day of December, 1877.

ABNER W. WATERS,
U. S. Marshal,
By W. P. BURNS, *Deputy.*

Returned and filed January 10th, 1878.

R. H. LAMSON, *Clerk.*

17 *Entry of appearance.*

In the circuit court of the United States for the ninth judicial circuit, district of Oregon.

JAMES VANCE, LOUISA J. VANCE, LIVY SWAN, and Almedia Swan, complainants,
vs.
A. R. BURBANK, DANIEL JOHNSON, THOMAS Heuston, Bartlett Whitlow, J. M. Belcher, M. J. Bird, R P. Bird, John Bird, Jacob Grazier, J. L. Ferguson, Harrison Allison, J. J. Butler, E. C. Bradshaw, Hull Johnson, James A. Campbell, Jesse Dixon, L. A. Dixon, J. W. Dunn, C. F. Royal, J. W. Watts, K. B. Mercer, Josiah Nelson, Robert Bird, W. F. Perkins, Geo. M. Perkins, G. W. Perkins, E. D. Perkins, A. H. Roberts, Matthew Patton, Aaron Frazer, Joseph Heuston, H. Hurley, and the county of Yamhill, defendants.

To R. H. LAMSON,
Clerk of the above entitled Court :

We hereby appear for the defendants Daniel Johnson, J. W. Watts, Geo. W. Perkins, R. P. Bird, Geo. M. Perkins, John Bird, Jacob Grazer, K. B Mercer, C. F. Royal, Aaron Frazer, Edgar D. Perkins, J. C. Nelson, Thomas Heuston, H. Hurley, Bartlett Whitlow, A. R.
18 Burbank, J. A. Heuston, Hull Johnson, J. L. Ferguson, E. C. Bradshaw, H. Allison, J. W. Dunn, A. H. Roberts, Wm. F. Perkins, James A. Campbell, Mrs. M. J. Bird, and the county of Yamhill, J. M. Belcher, Robert Bird, Jessie Dixon, M. Patton, and L. A. Dixon, in the above entitled suit, and move to have our appearance for said defendants duly entered in the order book.

DOLPH, BRONAUGH, DOLPH & SIMON,
Attorneys and Solicitors for all said Def'ts,
AND H. HURLEY AND GEO. H. BURNETT,
District Attorney for Third Judicial District, State of Oregon, Attorneys and Solicitors for County of Yamhill.

Filed and entered Feb. 4, 1878.

R. H. LAMSON,
Clerk.

19 *Stipulation.*

In the circuit court of the United States for the ninth judicial circuit, district of Oregon.

JAMES VANCE, LOUISA J. VANCE, AND LIVY Swan and Almedia Swan, complainants,
vs.
A. R. BURBANK, DANIEL JOHNSON, THOMAS Heuston, Bartlett Whitlow, J. M. Belcher, M. J. Bird, R. P. Bird, John Bird, Jacob Grazier, J. L. Ferguson, Harrison Allison, J. J. Butler, E. C. Bradshaw, Hull Johnson, James A. Campbell, Jesse Dixon, L. A. Dixon, J. W. Dunn, C. F. Royal, J. W. Watts, K. B. Mercer, Josiah Nelson, Robert Bird, W. F. Perkins, Geo. M. Perkins, G. W. Perkins, E. D. Perkins, A. H. Roberts, Matthew Patton, Aaron Frazer, Joseph Heuston, H. Hurley, and the county of Yamhill, defendants. } No. 386.

The defendants, Robert Bird, Jesse Dixon, M. Patton, L. A. Dixon, J. M. Belcher, Daniel Johnson, J. W. Watts, Geo. W. Perkins, R. P. Bird, Geo. M. Perkins, John Bird, Jacob Frazier, K. B. Mercer, C. F. Royal, Aaron Frazier, Edgar Perkins, J. C. Nelson, Thomas Huston, H. Hurley, Bartlett Whitlow, A. R. Burbank, J. A. Heuston, H. Johnson, J. L. Ferguson, E. C. Bradshaw, H. Allison, J. W. Dunn, A. H. Roberts, Wm. F. Perkins, James A. Campbell, Mrs. M. J. Bird, and
20 the county of Yamhill, desiring and proposing to demur to the bill in the above entitled suit, and on account of the number of the defendants, and of their having different places of residence, it being inconvenient for the demurrer to be verified by all the defendants within the time allowed by law to plead, to wit, the first Monday of March, 1878, it is hereby stipulated that the demurrer or demurrers, as the case may be, of the defendants may be verified by any one of the defendants joining in a demurrer, and shall be sufficient without a verification of the other defendants uniting in said demurrer, or any of them, and the verification of the other defendants of such demurrer or demurrers is hereby waived, and that such demurrers shall be filed on or before the first Monday in March, 1878.

That all the defendants shall enter demurrer, either jointly or separately, and the demurrers when set down for argument shall be set for the same time and argued together.

HILL, DURHAM AND THOMPSON,
Solicitors for Complainants,
By W. LAIR HILL.
DOLPH, BRONAUGH, DOLPH & SIMON,
Solicitors for said Defendants.
AND GEO. H. BURNETT,
District Attorney for the 3d Judicial District, State of Oregon,
AND H. HURLEY,
Solicitors for the Defendant, The County of Yamhill.

Filed Feb. 4, 1878.

R. H. LAMSON,
Clerk.

21 *Demurrer of defendants.*

In the circuit court of the United States for the district of Oregon.

JAMES VANCE, LOUISA J. VANCE, LIVY SWAN and ALMEDIA SWAN, complainants,
vs.
A. R. BURBANK, DANIEL JOHNSON, THOMAS Heuston, Bartlett Whitlow, J. M. Belcher, M. G. Bird, R. P. Bird, John Bird, Jacob Grazier, J. L. Ferguson, Harrison Allison, J. J. Butler, E. C. Bradshaw, Hull Johnson, James A. Campbell, Jesse Dixon, L. A. Dixon, J. W. Dunn, C. F. Royal, J. W. Watts, R. B. Mercer, Josiah Nelson, Robt. Bird, W. F. Perkins, Geo. H. Perkins, G. W. Perkins, E. D. Perkins, A. M. Roberts, Matthew Patton, Aaron Frazer, Joseph Heuston, H. Hurley and the County of Yamhill, defendants.

The demurrer of A. R. Burbank, Daniel Johnson, Thomas Heuston, Bartlett Whitlow, J. M. Belcher, M. J. Bird, R. P. Bird, John Bird, Jacob Grazier, J. L. Ferguson, Harrison Allison, E. C. Bradshaw, Hull Johnson, James A. Campbell, Jesse Dixon, L. A. Dixon, J. W. Dunn, C. F. Royal, J. W. Watts, R. B. Mercer, Josiah Nelson, Robert Bird, W. F. Perkins, Geo. M. Perkins, G. W. Perkins, E. D.
22 Perkins, A. H. Roberts, Matthew Patton, Aaron Frazer, Joseph Heuston, H. Hurley, and the County of Yamhill to the bill of complaint of James Vance, Louisa J. Vance, Livy Swan and Almedia Swan, complainants.

These defendants, respectively, by protestation, not confessing or acknowledging all or any of the matters and things in said complaint to be true in such manner and form as the same are therein or thereby set forth and alleged, do demur thereto, and for cause of demurrer show—

First. That the said complainants have not by said bill made such a case as entitles them in a court of equity to any relief from or against these defendants or either of them touching the matters contained in the said bill or any of them.

Second. That it appears by said complainants' own showing by their said bill of complaint that said complainants are not entitled to the relief prayed for by their said bill against these defendants or either of them.

Third. These defendants, for a further cause of demurrer, show that it appears by the said bill that the same is exhibited against these
23 defendants for several and distinct matters and causes in many whereof as appears by said bill only a portion of these defendants are in any manner interested or concerned, by reason of which distinct matters the said complainants' bill the same is multifarious, and by joining distinct matters together which do not depend on each other in said bill the pleadings, orders and proceedings will in the progress of the suit be intricate and prolix, and these defendants put to unnecessary costs and expenses and charges in relation to the same.

These defendants, for a further cause of demurrer, show—

Fourth. That said bill of complaint is multifarious; that all the parties defendant are not united in interest in all the property mentioned in said bill of complaint; but parties having separate and distinct interests in separate and distinct parcels of said real property, and claiming such interests under different titles, are joined as defendants in this suit.

That the complainants claim title from different sources to different portions of the land in controversy, and none of these defendants are interested in all of said property nor in all of the questions of titled involved.

24 Fifth. These defendants, for further cause of demurrer, show, that this suit was not commenced within five years from the date of the patents or either of the patents to said lands from the government mentioned in said bill of complaint, nor within one year after the passage of the act of the legislative assembly of the State of Oregon, entitled "An act to amend an act entitled 'An act to provide a code of civil procedure,' approved Oct. 11, 1862," which took effect Jan'y 24, 1871, and this suit is barred by the limitation prescribed by said act, and contained in sec. 378 of the code of civil procedure of the State of Oregon.

Sixth. These defendants, for further cause of demurrer, show that it appears upon the face of said bill that defendants and those under whom they respectively claim title have been in the open, notorious, adverse possession of said lands in said bill of complaint described for more than twenty years next preceding the commencement of this suit.

Seventh. These defendants, for a further cause of demurrer, show that it appears from said bill that neither of said complainants, nor their nor either of their ancestors, predecessors or grantors or

25 either of them was seized or possessed of the premises in controversy or any portion thereof within twenty years next before the commencement of this suit.

Eighth. These defendants, for a further cause of demurrer, show that it appears from said bill of complaint that more than twenty years had elapsed prior to the commencement of this suit since the time when said alleged fraud and deception is claimed to have been practiced upon said Lemuel Scott by said Joel Perkins, and since the execution of said agreement of Aug. 23, 1853; and the matter constituting said alleged fraud was during all said time apparent upon the face of said written agreement.

Ninth. These defendants, for further cause of demurrer, show that said bill shows upon its face that complainants have been guilty of gross laches in commencing this suit and in asserting their said pretended equitable rights and claim to the property in said bill described, and that because of such laches complainants are not entitled to the assistance of a court of equity, and their said bill ought to be dismissed.

Tenth. These defendants, for a further cause of demurrer, show

26 that the said alleged deception and fraud claimed by the complainants to have been practiced by said Joel Perkins upon their ancestor, the said Lemuel Scott, in regard to said division line, is shown upon the face of said complaint to have been in regard to a matter about which information was easily obtainable and alike accessible to both parties, and as to which said Lemuel Scott had no right to rely upon any representations of said Joel Perkins.

Eleventh. These defendants, for further cause of demurrer, show that it does not appear from said bill but that complainants have been aware of the facts constituting said alleged fraud and deception for many years past, and it does appear from said bill that said matter is of a

character the means of ascertaining which have for more than 20 years prior to the commencement of this suit been apparent.

Twelfth. These defendants, for further cause of demurrer, show that all the material facts and circumstances constituting the gravamen of the complaint made by said bill were properly cognizable and de-
27 terminable by the General Land Office Department of the Government, and are shown by said bill to have been considered and passed upon by said Department, and the same are not proper subjects of review in a court of equity.

DOLPH BRONOUGH, DOLPH &
SIMON & H. HURLEY,
Solicitors for all the Defendants Demurring.
& GEO. H. BURNETT,
Prosecuting Attorney for the 3rd Judicial Dist. of Oregon for the County of Yamhill.

I certify that in my opinion the foregoing demurrer of the defendants to the bill of complaint of the complainants is well founded in law and proper to be filed in the above cause.

J. N. DOLPH,
Solicitor, and of Counsel for Defendants.

UNITED STATES OF AMERICA,
District of Oregon, ss:

I, H. Hurley, being first duly sworn, do depose and say that I am one of the defendants demurring above, and that I have read the foregoing demurrer to the bill of complaint in this suit, and that the same is not interposed for the purpose of delaying said suit or any pro-
28 ceeding therein.

(Signed) H. HURLEY.

Subscribed and sworn to before me this 15th day of February, 1878.

JOSEPH SIMON,
Notary Public for Multnomah County, State and District of Oregon.

We hereby admit service of within demurrer upon us at Portland, Oregon, this February 21, 1878, by delivering to us a copy thereof.

HILL, DURHAM & THOMPSON,
Solicitors for Complainant,
By W. LAIR HILL.

Filed Feb. 21st, 1878.

R. H. LAMSON, *Clerk.*

29 *Notice of motion.*

In the circuit court of the United States for the district of Oregon.

JAMES VANCE, LOUISA J. VANCE, LIVY SWAN and Almedia Swan, complainants,
vs.
A. R. BURBANK, DANIEL JOHNSON, THOMAS Heuston, Bartlett Whitlow, J. M. Belcher, M. J. Bird, R. P. Bird, John Bird, Jacob Grazier, J. L. Ferguson, Harrison Allison, J. J. Butler, E. C. Bradshaw, Hull Johnson, James A. Campbell, Jesse Dixon, L. A. Dixon, J. W. Dunn, C. F. Royal, J. W. Watts, K. B. Mercer, Josiah Nelson, Robert Bird, W. F. Perkins, Geo. M. Perkins, G. W. Perkins, E. D. Perkins, A. H. Roberts, Matthew Patton, Aaron Frazier, Joseph Heuston, H. Hurley and the County of Yamhill, defendants.

To the above named complainants and to Messrs. Hill, Durham & Thompson, and Thayer & Williams, their solicitors:

You are hereby notified that on Monday the 25th day of February, A. D. 1878, at 10 o'clock a. m., or as soon thereafter as counsel can be heard, the above named defendants, except the defendant J. J. Butler, will move the above entitled court upon the bill of complaint in the
30 above entitled suit, and upon the affidavit of J. W. Watts herewith filed, for an order requiring the complainants in the above entitled suit to give security for costs upon the ground that said complainants, and each of them, are shown by said bill to be non-residents of the State and district of Oregon.

DOLPH, BRONAUGH, DOLPH & SIMON,
Solicitors for all the Defendants except J. J. Butler.

Copy served upon me, at Portland, Oregon, this Feb'y 20, 1878.
G. H. DURHAM,
Of Compl'ts Solicitors.

Filed Feb. 25th, 1878.

R. H. LAMSON, *Clerk.*

31 *Demand for security for costs.*

In the circuit court of the United States for the district of Oregon.

JAMES VANCE, LOUISA J. VANCE, LIVY SWAN and Almedia Swan, complainants,
vs.
A. R. BURBANK, DANIEL JOHNSON, THOMAS Heuston, Bartlett Whitlow, J. M. Belcher, M. J. Bird, R. P. Bird, John Bird, Jacob Grazier, J. L. Ferguson, Harrison Allison, J. J. Butler, E. C. Bradshaw, Hull Johnson, James A. Campbell, Jesse Dixon, L. A. Dixon, J. W. Dunn, C. F. Royal, J. W. Watts, K. B. Mercer, Josiah Nelson, Robert Bird, W. F. Perkins, Geo. M. Perkins, G. W. Perkins, E. D. Perkins, A. H. Roberts, Matthew Patton, Aaron Frazier, Joseph Heuston, H. Hurley and the County of Yamhill, defendants.

To the above named complainants and to Messrs. Hill, Durham & Thompson, & Thayer and Williams, their solicitors:

The above named defendants, except the defendant J. J. Butler, hereby demand that the above named complainants who appear from the bill of complaint to be non-resident of the State and circuit of
32 Oregon, give security for costs and disbursements of the above entitled suit as by law & the practice of the court in such case provided.

DOLPH, BRONAUGH, DOLPH & SIMON,
Solicitors for all of the above named Defendants except the Defendant J. J. Butler.

Copy served Feb'y 20, 1878, upon us, at Portland, Oregon.
HILL, DURHAM & THOMPSON,
Solicitors for Compl't.

Filed Feb. 25, 1878.
R. H. LAMSON, *Clerk.*

33 *Affidavit to compel pl'ffs to give security for costs.*

In the circuit court of the United States for the district of Oregon.

JAMES VANCE ET AL., COMPLAINANTS,
vs.
A. R. BURBANK ET AL., DEFENDANTS.

UNITED STATES OF AMERICA,
District of Oregon, ss:

I, J. W. Watts, being duly sworn, say that I am one of the defendants in the above-entitled suit, and that each and all of the complainants, as I am informed and verily believe, are residents as well as citizens of the State of California, and are non-residents of the State of Oregon and of the district of Oregon.

J. W. WATTS.

Subscribed and sworn to before me this 19th day of February, A. D. 1878.
[SEAL.]
JOSEPH SIMON,
Notary Public Multnomah County, Oregon.

Filed Feb. 25th, 1878.
R. H. LAMSON, *Clerk.*

34 *Order setting for hearing motion for security for costs.*

In the circuit court of the United States for the district of Oregon.

JAMES VANCE ET AL.
vs.
A. R. BURBANK ET AL. } No. 386.

FEBRUARY 25TH, 1878.

At this day, on motion of Mr. E. C. Bronaugh, of counsel for defendants, it is ordered that the motion filed herein by defendants for an order requiring complainants to give security for the costs of this suit be set for hearing on five days' notice by either party, without prejudice.

(Signed) DEADY, *J.*

Filed and entered February 25th, 1878.

R. H. LAMSON, *Clerk.*

35 *Order dismissing bill as to Dixon, M. J. Bird, and C. F. Royal.*

In the circuit court of the United States for the district of Oregon.

JAMES VANCE ET AL.
vs.
A. R. BURBANK ET AL. } No. 386.

MARCH 4TH, 1878.

Now at this day come the complainants, by Messrs. George H. Durham and H. Y. Thompson, and the defendants, by Messrs. J. N. Dolph and E. C. Bronaugh, and on motion of said complainants, it is ordered that the bill herein be dismissed as to the defendants L. A. Dixon, Jesse Dixon, M. J. Bird, and C. F. Royal.

(Signed) DEADY, *J.*

Filed and entered March 4th, 1878.

R. H. LAMSON, *Clerk.*

36 *Order for leave to file amended bill of complaint.*

In the circuit court of the United States for the district of Oregon.

JAMES VANCE ET AL.
vs.
A. R. BURBANK ET AL. } No. 386.

APRIL 8TH, 1878.

Now at this day comes the plaintiffs, W. Lair Hill of counsel, and the defendants, by Mr. C. A. Dolph of counsel, and on motion of said plaintiffs, it ir ordered that they have leave to file an amended bill of complaint herein, and that defendants have till Monday, the 13th day May, to plead thereto.

(Signed) DEADY, *J.*

Filed April 8th, 1878.

R. H. LAMSON, *Clerk.*

37 *Amendments to bill.*

In the circuit court of the United States for the district of Oregon.

JAMES VANCE, LOUISA J. VANCE, LIVY SWAN, and ALMEDIA SWAN, complainants,
vs.
A. R. BURBANK, THOMAS HEUSTON, BARTLETT Whitlow, J. M. Belcher et al., defendants.

Amendments to the bill of complaint in this cause made pursuant to an order of this court, dated the 8th day of April, 1878.

First. In the second line from the bottom of the 2nd folio of the bill, after the figure "1850," interline and insert these words:

Said Joel Perkins, being then an unmarried man, and notwithstanding he then had no title or right to any of the lands included in said Joel Perkins tract, executed a deed of conveyance to the board of county commissioners of said county of Yam Hill, purporting to convey to them as such commissioners all of that part of said Joel Perkins'

38 tract which is embraced within the tract heretofore designated as the town site tract, and thereby abandoning all his claim of right to the same which said deed purported to convey, and abandoned whatsoever possession he had thereof and thereon.

Second. Strike out of said bill that part thereof commencing with the words "and thereupon," in the 5th line from the top of the 6th folio of the bill (at the close of said line) and extending to and including the word "affirmed" in the 17th line of the 6th folio of the bill (being the first word in said line).

Third. Instead of the part of the bill to be stricken out as above set forth, and in place thereof, interline and insert the following:

And thereupon the said Lemuel Scott petitioned the register and receiver to re examine and reconsider or examine further the said matter of final proof of residence and cultivation by said Joel Perkins, to the end that the claim and rights of said Lemuel Scott and of the heirs of his deceased wife might be secured and protected, but that he

39 was unable to get the register and receiver to decide upon his petition whether they would re-examine or reconsider, or examine further said matter, or to decide whether said pretended final proofs of residence and cultivation by said Joel Perkins should be allowed as proof of said residence and cultivation.

That he requested and urged to decide the said matter and file their decision so that he could regularly pursue his rights by appeal to the higher branches of the United States Land Office, as by law provided, but that the register abruptly replied, "Before I retire from the office of register I will write out a decision which will effectually close you out," and that said register and receiver never did render any decision upon the matter so presented to them by the said Lemuel Scott, and no decision was given upon the claim of said Joel Perkins, until the decision was given as hereinafter stated in the contest which arose out of the conflict of boundary between the Lemuel Scott claim, the Joel Perkins tract, and the town-site tract.

40 That at the time the county commissioners of the said county of Yam Hill entered said town-site tract, as aforesaid, and on account of the conflict of boundaries between said town-site tract and said Joel Perkins tract, and between each of these two tracts and the said Lemuel Scott claim, the said Lemuel Scott and the heirs of the said

Joel Perkins (he having died before that time) were notified to make their contests for their said tracts respectively. But your orators were not notified thereof, nor of the entry of said town-site tract by said county commissioners, and never were in any way parties to said contests, or any of them.

That in pursuance of said notice to the said Lemuel Scott and the heirs of said Joel Perkins, and in prosecution of their said contests, the parties began to take depositions of witnesses upon the matters of fact involved in said contest, in accordance with the usual practice in such cases in the Land Office. But as soon as the depositions of the witnesses called in support of said town-site entry were taken, and before the deposition of the witnesses called on behalf of said Lemuel
41 Scott were taken, the depositions so taken in support of the said town-site entry were transmitted to the register and receiver, who forthwith proceeded to hear and decide the said contests without having evidence on the part of said Lemuel Scott on behalf of his said claim, and decided that said town-site entry should be allowed, and that the claim of the said Lemuel Scott to that part of said Lemuel Scott claim which was embraced within the said town-site tract should be disallowed and rejected.

That shortly thereafter said Lemuel Scott requested and petitioned the register and receiver to reopen and rehear said contest, in order that evidence on behalf of said Lemuel Scott and in support of his said claim might be taken and heard, but the said officer refused to grant said request and petition. That thereupon the said Lemuel Scott petitioned the Commissioner of the General Land Office of the United States for an order requiring the said register and receiver to reopen said contest, and allow said Lemuel Scott to produce evidence in
42 support of his said claim; and the Commissioner of the General Land Office upon said petition made an order directing said contest to be reopened as prayed for by said Lemuel Scott.

That a rehearing of said contest was had before the register and receiver, and that on such rehearing, in addition to the false and fraudulent evidence hereinbefore referred to, such further false and fraudulent evidence of residence upon and cultivation of said Joel Perkins was produced by the heirs and representatives of said Joel Perkins for the purpose of deceiving the officers of the Land Office of the United States and defrauding the said Lemuel Scott and Caroline Scott and your orators, as that the register and receiver at the land office, to wit, on the 1st day of February, 1862, decided that said Joel Perkins or his heirs were entitled to receive the patent certificate for all of said Joel Perkins tract except that part thereof which was included within the town-site tract, as hereinafter stated.

That the said Lemuel Scott, within the time allowed by law for that purpose, duly appealed from the decision last aforesaid to the
43 Commissioner of the General Land Office, and that he employed one J. T. Neeley, an attorney, then practicing as such at Washington City and before the Land Office there, to present his said appeal before the Commissioner, but that previous to or about the time when the said appeal was transmitted to the said Commissioner by the register and receiver from whose decision said appeal was taken, the said J. T. Neely, as your orators are informed and believe, abandoned his employment in said case of said Lemuel Scott in prosecuting said appeal, left the city of Washington and went into the States which were then in rebellion against the Government of the United States and joined the rebellion of said States, without notifying the said Lemuel

Scott of his intention to do so; and your orators are informed and believe the said Lemuel Scott had no notice or information of the said abandonment of his said business by said Neeley nor said Neeley's departure from Washington City until after the said Commissioner had gave his decision upon said appeal, as hereinafter stated.

44 That during the time said States were in rebellion and for more than a year thereafter, the business of the Land Department of the government at Washington City being greatly delayed, hindered and confused by and on account of said rebellion, the said Lemuel Scott supposed that the determination of his said appeal was delayed thereby, and that his appeal would be determined as soon as it could be reached in its order, and that he was all the time relying upon said Neely to prosecute his said appeal and to attend to all matters pertaining thereto, but your orators say, that in transmitting said appeal to the Commissioner of the General Land Office, the register and receiver from whose decision said appeal was taken, failed and omitted to transmit therewith all the evidence which had been offered, introduced, and used on the hearing of said contest before them, and that a large number of original depositions, exhibits, and documents introduced and used in evidence before the register and receiver on the hearing of said contest were never transmitted to said Commissioner, and the said

45 Commissioner never did have before him on said appeal the said depositions, exhibits, and documents so omitted to be transmitted.

That among said depositions, exhibits, and documents which were not transmitted to the said commissioner were some which had been taken, introduced, and used on behalf of said Lemuel Scott on the hearing of said contest before the register and receiver, and which strongly supported the claim of said Lemuel Scott in said contest; and that, as your orators are informed and believe, the said Lemuel Scott was wholly ignorant of the omission to transmit said depositions, exhibits and documents, and fully supposed, until within one year last past, that all the depositions and evidence used in the contest before the register and receiver had been duly transmitted along with said appeal; and your orators say—

That the Commissioner of the General Land Office, on the second day of March, 1866, having before him only a part of the evidence which had been used upon the hearing of said contest before the

46 register and receiver, and not having before him any of the depositions, exhibits, and documents which the register and receiver had failed as aforesaid to transmit, the said Lemuel Scott not being represented there in person or by attorney, proceeded to hear and determine said appeal, and then affirmed the said decision of the register and receiver.

That the said Lemuel Scott, upon being notified of said decision of the Commissioner, duly appealed from the said Commissioner to the Secretary of the Interior, and employed attorneys to prosecute his said appeal, and that such further proceedings were had that, on the 9th day of September, 1868, the Secretary of Interior having before him only the evidence which had been transmitted to the Commissioner with said appeal from the register and receiver, and not having before him the evidence which had been omitted as aforesaid to be sent to the Commis-

sioner, proceeded to hear and determine said appeal, and then affirmed said decision of the Commissioner and of the register and receiver.

(Sig) W. LAER HILL,
G. H. DURHAM,
H. T. THOMPSON,
Sol's for Complainants.

Filed April 8th, 1878.

R. H. LAMSON, *Clerk.*

47 *Demurrer to amended bill.*

In the circuit court of the United States for the district of Oregon.

JAMES VANCE, LOUISA J. VANCE, LIVY SWAN, and ALMEDIA SWAN, complainants,
vs.
A. R. BURBANK, DANIEL JOHNSON, THOMAS Heuston, Bartlett Whitlow, J. M. Belcher, M. J. Bird, R. P. Bird, John Bird, Jacob Grazier, J. L. Ferguson, Harrison Allison, J. J. Butler, E. C. Bradshaw, Hull Johnson, James A. Campbell, Jesse Dixon, L. A. Dixon, J. W. Dunn, C. F. Royal, J. W. Watts, K. B. Mercer, Josiah Nelson, Robert Bird, W. F. Perkins, Geo. H. Perkins, G. W. Perkins, E. D. Perkins, A. M. Roberts, Matthew Patton, Aaron Frazer, Joseph Heuston, H. Hurley, and the County of Yamhill, defendants.

The demurrer of A. R. Burbank, Daniel Johnson, Thomas Heuston, Bartlett Whitlow, J. M. Belcher, M. J. Bird, R. P. Bird, John Bird, Jacob Grazier, J. L. Ferguson, Harrison Allison, E. C. Bradshaw, Hull Johnson, James A. Campbell, Jesse Dixon, L. A. Dixon, J. W. Dunn, C. F. Royal, J. W. Watts, K. B. Mercer, Josiah Nelson, Robert
48 Bird, W. F. Perkins, Geo. M. Perkins, G. W. Perkins, E. D. Perkins, A. H. Roberts, Matthew Patton, Aaron Frazer, Joseph Heuston, H. Hurley, and the County of Yamhill to the amended bill of complaint of James Vance, Louisa J. Vance, Livy Swan, and Almedia Swan, complainants.

These defendants respectively, by protestation, not confessing or acknowledging all or any of the matters and things in said amended complaint to be true in such manner and form as the same are therein or thereby set forth and alleged, do demur thereto, and for cause of demurrer show—

First. That the said complainants have not by said bill made such a case as entitles them in a court of equity to any relief from or against these defendants, or either of them, touching the matters contained in the said bill, or any of them.

Second. That it appears by said complainants' own showing by their said bill of complaint that said complainants are not entitled to the relief prayed for by their said bill against these defendants, or either of them.

Third. These defendants, for a further cause of demurrer, show
49 that it appears by the said bill that the same is exhibited against these defendants for several and distinct matters and causes, in

many whereof, as appears by said bill, only a portion of these defendants are in any manner interested or concerned, by reason of which distinct matters the said complainant's bill is multifarious, and by joining distinct matters together which do not depend on each other in said bill, the pleadings, orders, and proceedings will in the progress of the suit be intricate and prolix, and these defendants will be put to unnecessary costs and expenses and charges in relation to the same.

These defendants, for a further cause of demurrer, show:

Fourth. That said bill of complaint is multifarious; that all the parties defendant are not united in interest in all the property mentioned in said bill as amended, but parties having separate and distinct interests in separate and distinct parcels of said real property, and claiming such interests under different titles are joined as defendants in this suit.

That the complainants claim title from different sources to dif-
50 ferent portions of the land in controversy, and none of these defendants are interested in all of said property, nor in all of the questions of title involved.

Fifth. These defendants, for further cause of demurrer, show that this suit was not commenced within five years from the date of the patents or either of the patents to said lands from the government mentioned in said bill of complaint, nor within one year after the passage of the act of the legislative assembly of the State of Oregon, entitled "An act to amend an act entitled 'an act to provide a code of civil procedure,'" approved Oct. 11, 1862, which took effect January 24, 1871, and this suit is barred by the limitation prescribed by said act and contained in sec. 378 of the code of civil procedure of the State of Oregon.

Sixth. These defendants, for further cause of demurrer, show that it appears upon the face of said amended bill that defendants and those under whom they respectively claim title have been in the open, notorious, adverse possession of said lands in said bill of complaint
51 as amended described for more than twenty years next preceding the commencement of this suit.

Seventh. These defendants, for a further cause of demurrer, show that it appears from said bill that neither of said complainants, nor their nor either of their ancestors, predecessors or grantors, or either of them, was seized or possessed of the premises in controversy, or any portion thereof, within twenty years next before the commencement of this suit.

Eighth. These defendants, for a further cause of demurrer, show that it appears from said bill of complaint as amended that more than twenty years had elapsed prior to the commencement of this suit since the time when said alleged fraud and deception is claimed to have been practised upon said Lemuel Scott by said Joel Perkins, and since the execution of said agreement of Aug. 23, 1853, and the matter constituting said alleged fraud was during all said time apparent upon the face of said written agreement.

Ninth. These defendants, for further cause of demurrer, show that said bill shows upon its face that complainants have been guilty
52 of gross laches in commencing this suit and in asserting their said pretended equitable rights and claim to the property in said bill described, and that because of such laches complainants are not entitled to the assistance of a court of equity, and their said bill ought to be dismissed.

Tenth. These defendants, for a further cause of demurrer, show that the said alleged deception and fraud claimed by the complainants to have been practiced by said Joel Perkins upon their ancestor, the said

Lemuel Scott, in regard to said division line is shown upon the face of said complaint to have been in regard to a matter about which information was easily obtainable and alike accessible to both parties, and as to which said Lemuel Scott had no right to rely upon any representations of said Joel Perkins.

Eleventh. These defendants, for further cause of demurrer, show that it does not appear from said bill, but that complainants have been aware of the facts constituting said alleged fraud and deception for many years past, and it does appear from said amended bill that said matter
53 is of a character, the means of ascertaining which have for more than 20 years prior to the commencement of this suit been apparent.

Twelfth. These defendants for further cause of demurrer show that all the material facts and circumstances constituting the gravamen of the complaint made by said bill were properly cognizable and determinable by the General Land Office department of the government and are shown by said bill to have been considered and passed upon by said department, and the same are not proper subjects of review in a court of equity.

Thirteenth. These defendants for further cause of demurrer show that the matters alleged in said amended bill to show action on the part of the register and receiver and of the Land Department aforesaid unjustly prejudicial to the rights of the complainants in determining said opposing and conflicting claims to said lands, appear on the face of said bill to have been and to be of a character readily and easily ascertainable by the exercise of reasonable diligence and the circumstances relied upon in said amended bill to excuse the delay in complaining thereof, themselves show the complainants to be charg'able with
54 gross laches and inexcusable neglect in not having sooner ascertained and complained thereof.

DOLPH, BRONOUGH, DOLPH & SIMON,
Solicitors for Defendants.

I certify that in my opinion the foregoing demurrer of the defendants to the bill of complaint of the complainants is well founded in law and proper to be filed in the above cause.

(Signed) J. N. DOLPH,
Solicitor and of Counsel for Defendants.

UNITED STATES OF AMERICA,
District of Oregon, ss :

I, J. M. Belcher, being first duly sworn, do depose and say that I am one of the defendants demurring above, and that I have read the foregoing demurrer to the bill of complaint as amended in this suit and that the same is not interposed for the purpose of delaying said suit or any proceeding therein.

(Signed) J. M. BELCHER.

Subscribed & sworn to before me this day of April, A. D. 1878.
[SEAL.] O. P. MASON,
Notary Public for Oregon.

Filed April 24th, 1878.

R. H. LAMSON, *Clerk.*

Due service of copy of the within demurrer upon us admitted this 24th day of April, 1878.

W. LAIR HILL,
Of Counsel for Complainants.

55 *Order.*

In the circuit court of the United States, district of Oregon. In equity.

JAMES VANCE ET AL.
vs.
A. R. BURBANK ET AL.

Let an order be entered in the above-entitled cause sustaining the demurrer and dismissing the bill.

(Signed) LORENZO SAWYER,
Circuit Judge.

Filed Aug. 5th, 1878.

R. H. LAMSON, *Clerk.*

56 *Order sustaining demurrer and dismissing bill.*

In the circuit court of the United States for the ninth judicial circuit, district of Oregon.

JAMES VANCE, LOUISA J. VANCE, ET AL.
vs.
A. R. BURBANK, YAMHILL COUNTY, ET AL. } No. 386

AUGUST 5TH, 1878.

Now, at this day, come the complainants, by Mr. George H. Durham, and the defendants by Mr. Joseph N. Dolph, of counsel, and this cause having been heretofore heard on the demurrer to the bill herein and argued by counsel and taken under advisement by the court, and now at this day the court being fully advised in the premises, it is ordered and decreed that said demurrer be and the same is hereby sustained and that the bill herein be and the same is hereby dismissed; and it is further ordered that said plaintiffs have till August 20th, 1878, to file an application for a rehearing or to amend as they may be advised.

(Signed) DEADY, *J.*

Filed August 5th, 1878.

R. H. LAMSON, *Clerk.*

57 Know all men by these presents that we, H. W. Scott, & L. Scott, are held and firmly bound unto A. R. Burbank, Daniel Johnson, Thomas Heuston, Bartlett Whitlow, J. M. Belcher, M. J. Bird, R. P. Bird, John Bird, Jacob Grazier, J. L. Ferguson, Harrison Allison, J. J. Butler, E. C. Bradshaw, Hull Johnson, James A. Campbell, Jesse Dixon, L. A. Dixon, J. W. Dunn, C. F. Royal, J. W. Watts, K. B. Mercer, Josiah Nelson, Robert Bird, W. F. Perkins, Geo. M. Perkins, G. W. Perkins, E. D. Perkins, A. H. Roberts, Mathew Patton, Aaron Frazer, Joseph Heuston, H. Hurley, and the county of Yamhill in the full and just sum of two hundred dollars, to be paid to the said A. R. Burbank, Daniel Johnson, Thomas Heuston, Bartlett Whitlow, J. M. Belcher, M. J. Bird, R. P. Bird, John Bird, Jacob Grazier, J. L. Ferguson, Harrison Allison, J. J. Butler, E. C. Bradshaw, Hull Johnson, James A. Campbell, Jesse Dixon, L. A. Dixon, J. W. Dunn, C. F. Royal, J. W. Watts, K. B. Mercer, Josiah Nelson, Robert Bird, W. F. Perkins, Geo. M. Perkins, G. W. Perkins, E. D. Perkins, A. H. Roberts, Mathew Patton, Aaron Frazer, Joseph Heuston, H. Hurley, and the County of Yamhill, their executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and admin-

istrators, jointly and severally, by these presents, sealed with our seals and dated this 30th day of September, in the year of our Lord one thou sand eight hundred and seventy-eight.

Whereas lately, at a term of the circuit court of the United States for the district of Oregon, held at Portland, in the State of Oregon, in a suit depending in said court between James Vance, Louisa J. Vance, Livy Swan, and Almedia Swan, complainants, and A. R. Burbank, Daniel Johnson, Thomas Heuston, Bartlett Whitlow, J. M. Belcher, M. J. Bird, R. P. Bird, John Bird, Jacob Grazier, J. L. Ferguson, Harrison Allison, J. J. Butler, E. C. Bradshaw, Hull Johnson, James A. Campbell, Jesse Dixon, L. A. Dixon, J. W. Dunn, C. F. Royal, J. W. Watts, K. B. Mercer, Josiah Nelson, Robert Bird, W. F. Perkins, Geo. M. Perkins, G. W. Perkins, E. D. Perkins, A. H. Roberts, Matthew Patton, Aaron Frazer, Joseph Heuston, H. Hurley, and the County of Yamhill, defendants, a final decree was rendered against the said complainants, and the said complainants having obtained an order allowing an appeal to remove the said cause to the Supreme Court of the United States, and filed a copy thereof in the clerk's office of said court,
58 to reverse the said decree and judgment in the aforesaid suit, and a citation directed to said defendants citing and admonishing to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next.

Now, the condition of the above obligation is such that if the said appellants shall prosecute their said appeal to effect and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

H. W. SCOTT. [SEAL.]
L. SCOTT. [SEAL.]

Sealed and delivered in presence of—
G. H. DURHAM.
H. Y. THOMPSON.

(Endorsed:) Approved Oct. 1, 1878.
(Signed) DEADY, *J.*

Filed Oct. 1, 1878.

R. H. LAMSON, *Clerk.*

59 In the circuit court of the United States for the ninth judicial circuit, district of Oregon.

JAMES VANCE, LOUISA J. VANCE, LIVY SWAN, and ALMEDIA SWAN, complainants,
vs.
A. R. BURBANK, DANIEL JOHNSON, THOMAS Heuston, Bartlett Whitlow, J. M. Belcher, M. J. Bird, R. P. Bird, John Bird, Jacob Grazier, J. L. Ferguson, Harrison Allison, J. J. Butler, E. C. Bradshaw, Hull Johnson, James A. Campbell, Jesse Dixon, L. A. Dixon, J. W. Dunn, C. F. Royal, J. W. Watts, K. B. Mercer, Josiah Nelson, Robert Bird, W. F. Perkins, Geo. M. Perkins, G. W. Perkins, E. D. Perkins, A. H. Roberts, Matthew Patton, Aaron Frazer, Joseph Heuston, H. Hurley, and the County of Yamhill, defendants. } No. 386.

SEPTEMBER 30TH, 1878.

Now, at this day, come the complainants in the above-entitled suit,

Mr. George H. Durham, of counsel, and move the court for an order allowing the plaintiffs herein to take an appeal to the Supreme Court of the United States from the decree of this court rendered in this cause. In consideration whereof it is ordered and adjudged that said plaintiffs be, and they are hereby, allowed to take an appeal from the decree of this court rendered in this cause to the Supreme Court of the United States.

DEADY, *J.*

(Indorsed:) No. 386. In the circuit court of the United States for the ninth judicial circuit, district of Oregon. James Vance et al. vs. A. R. Burbank et al. Order allowing appeal. Filed Sept. 30, 1878. R. H. Lamson, clerk.

60 In the circuit court of the United States for the district of Oregon.

JAMES VANCE, LOUISA J. VANCE, LIVY SWAN, and ALMEDIA J. SWAN,
vs.
A. R. BURBANK, YAMHILL COUNTY, ET AL.

DISTRICT OF OREGON, *ss:*

I hereby certify that the foregoing copies of the papers, pleadings, and orders of court in the above-entitled cause have been by me compared with the original papers, pleadings, and orders of court, constituting the record in said cause, and that they are correct copies of such originals and of the whole thereof as the same appear of record and on file in my office and in my custody.

Witness my hand and the seal of said court, at Portland, in said district, this first day of October, 1878.

[SEAL.] R. H. LAMSON, *Clerk.*

(Indorsement on cover:) No. 553. James Vance et al., appellants, vs. A. R. Burbank et al. Oregon C. C. U. S. Filed 14th October, 1878

IN THE

Supreme Court of the United States.

No. 553.

JAMES VANCE ET AL,

VS.

A. R. BURBANK ET AL.

IN EQUITY.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

Brief and Argument of

W. LAIR HILL,

Counsel for Appellants

PORTLAND, OREGON,
McCORMICK BROS., JOB PRINTERS, 91 SECOND STREET,
1879.

IN THE

Supreme Court of United States.

No. 553.

JAMES VANCE ET AL,

VS.

A. R. BURBANK ET AL.

IN EQUITY.

APPEAL FROM CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

Brief and Argument of

W. LAIR HILL,

Counsel for Complainants.

STATEMENT OF THE CASE.

This suit was commenced in the Circuit Court of the U. S. for the State of Oregon, on the 24th day of December, 1877

and its object is to have the title to the lands in controversy, decreed to be held by the defendants in trust for the complainants, and to have defendants execute deeds therefor to the complainants.

The bill was amended, by leave of the court (**Record, folio 36**), but the bill as amended was not engrossed, and in the printed record the bill as originally filed is set out, omitting the part stricken out by amendment, and the and the amendment is printed on a separate paper. To facilitate inspection of the bill as a whole, we here present it, excepting title and prayer, with the amendments incorporated at their proper places. The amendments are enclosed in brackets, and one or two trifling verbal inaccuracies which have occurred either in transcribing or printing, are corrected by inserting the proper word in parenthesis, with an asterisk immediately after the word as it appears in the record. The references to the Record refer to the top paging of the printed record, but the marginal paging is also preserved.

We present, also, a plat of the several tracts of land involved; the Lemuel Scott Claim in red lines; the Joel Perkins Claim in green lines; the Townsite Entry in blue lines; the line agreed upon on the ground designated "True Compromise line," and the line described in the false writing designated as "False Compromise line."

The bill, (omitting title and prayer) is as follows: (**Record, folio 1.**)

Your orators, James Vance, Louisa J. Vance, Livy Swan and Almedia Swan, humbly complaining show unto your Honors, that they, your orators, are citizens of the State of California and all the defendants are citizens of the State of Oregon, and the defendant the County of Yamhill is a municipal corporation in said State of Oregon. That your orator Louisa J. Vance, is and has been ever since prior to the year

1866 the wife of your orator James Vance; and your orator Almedia Swan is and has been ever since prior to the year 1866, the wife of your orator Livy Swan.

That heretofore, to wit: on the 20th day of July, 1848, one Lemuel Scott, who was a white male citizen of the United States, over twenty-one years of age and a married man, was a settler upon and claimant of a track or parcel of the public lands in the Territory of Oregon, bounded as follows: Commencing at a point 9.64 chains South and 8.12 chains East of the Northwest corner of Section 5 in Township 4 South, Range 3 West of Wallamet Meridan, as said corner of said Section was established by the United States serveys subsequently made, (the United States surveys not having been, at said date of July 20th, 1848, extended over said lands); and running thence West 53.35 chains; thence South 38.50 chains; thence due West to a point 9.50 chains west of the Range line between Ranges 3 and 4 West of Wallamet Meridan; thence due South to a point 13.39 chains South of the line between Sections 1 and 12 in Township 4 South, Range 4 west; thence east 62.25 chains; thence north 23 degrees east 21-50 chains: thence north 85 degrees east, 5.17 chains; thence north 23 degrees east 39 chains; thence east 28.25 chains; thence north 23 chains; thence west to the place of beginning, containing six hundred and forty (640) acres; which said tract of land is hereinafter designated, for convenience of reference, as the *Lemuel Scott Claim*. That said Lemuel Scott settled upon and became a claimant of said land under the laws of the provisional government of said Territory of Oregon and that he resided upon and cultivated said land from the said 20th day of July, 1848, continuously for more than four successive years thereafter, and until the month of February 1861; and that during all that time the residence upon, and possession and cultivation of, said land by said Lemuel Scott were open, visible, notorious, and well-known. **(Record, folio 2.)**

Your orators further show that Mary Jane Scott was

2 the wife of said Lemuel Scott, and was living with him on said land on the 20th day of July 1848, and so continued until the 9th day of April 1851, when she died, leaving three children, namely, your orator Louisa J. Vance, then Louisa J. Scott aged 5 years, your orator Almedia Swan, aged one year, then Almedia Scott, and Caroline Scott, aged 3 years.

Your orators further show, that on the 9th day of October, A. D. 1852, and within three months after the said land was surveyed by authority of the United States, the said Lemuel Scott duly notified the Surveyor General of the said Territory of Oregon, of the precise tract of land so settled upon by him, claiming the same as a Donation Land Claim, under the act of Congress entitled, "An Act to Create the office of Surveyor General of the Public Lands in Oregon, and to provide for the survey and to make Donations to Settlers of the said Public Lands," approved September 27th 1850, and commonly called the Donation Law; and the Surveyor General then and there, in presence of said Lemuel Scott, entered a diagram or map of said tract so notified upon, on the Township plat of the Townships in which said land was situated.

That on the said 9th day of October, 1852, the said Lemuel Scott made and presented to the Surveyor General, final proof that he had resided upon and cultivated said tract of land for four consecutive years from and after said 20th day of July, A. D. 1848, as aforesaid, and had, in all respects, complied with the acquirements of said Donation Law, so as to entitle him to said land, one-half thereof to himself and the other half to his said wife or her heirs, and that he then demanded of the said Surveyor General that he issue the certificate of proof of compliance with the law, and that he designate the part of said land enuring to the said Lemuel Scott and that part enuring to the said Mary Jane Scott his wife.

Your orators further show, that on the 8th day of October, A. D. 1852, the day next preceding that on which the said Lemuel Scott made and presented his said proof of residence

and cultivation, one Joel Perkins, a married man, filed with the said Surveyor General a Notification as claimant under the said Donation Law of a tract of land of 640 acres, embracing and including that part of the said Lemuel Scott Claim lying within the following boundaries, to wit, commencing at a point 9.50 chains west and 13.39 chains south of the northeast corner of section 12 in Township 4 south Range 4 west of Wallamet Meridan, and running thence east along the said Lemuel Scott Claim 62.25 chains to the southeast corner thereof; thence north 47 chains; thence north 64 degrees west to the intersection of such line with the west line of said Lemuel Scott Claim; thence south along the line of said Lemuel Scott Claim 12.75 chains to a northwest inner angle of said Lemuel Scott Claim; thence west along the bounday of said Lemuel Scott Claim, to a point 9.50 chains west of the range line between Townships Nos. 3 and 4 west of the Wallamet Meridan; and thence south to the place of beginning; which land so embraced and included in said Notification of said Joel Perkins and also in the said Lemuel Scott Claim, is hereinafter, for convenience of reference, designated as the *Joel Perkins Tract;* and that because of said filing of Notification by said Joel Perkins, the said Surveyor General declined to grant the said certificate of settlement, residence and cultivation, to the said Lemuel Scott, or to make the designation of the part of said Lemuel Scott Claim which should enure to said Lemuel Scott and the part which should enure to his said wife, there being by said filing of Notification by said Joel Perkins, (**Record, folio 3**), a conflict between the claim of said Lemuel Scott and the claim of said Joel Perkins.

Your orators further show that on the day of May, A. D. 1850, (**Record, folio 23,**) [said Joel Perkins, being then an unmarried man, and notwithstanding he then had no title or right to any of the lands included in said Joel Perkins tract, executed a deed of conveyance to the board of county commissioners of said county of Yamhill, purporting to convey to them as such commissioners all of that part of said Joel
38 tract which is embraced within the tract hereinafter designated as the town site tract, and thereby abandon-

ing all his claim of right to the same which said deed purported to convey, and abandoned whatsoever possession he had thereof, and thereon] the Probate Court of Yamhill County **(Record, folio 3.)** acting as a board of court commissioners [County Commissioners] claiming to act under the Act of Congress approved May 23d, 1844, commonly called the Townsite Law of 1844, and claiming the right to enter under the provisions of that act, caused a survey and plat to be made of a part of said lands heretofore described and embraced within both the said Notification of Lemuel Scott, and the said Notification of the said Joel Perkins, and which part so surveyed by the said Probate Court, is more particularly described and bounded as follows: commencing at the same point herein before specified as the beginning point in the description of the said Joel Perkins Tract, and running thence east along the south line of the said Lemuel Scott Claim 29.50 chains; thence north 29.80 chains; thence west 29.50 chains to the west line of said Lemuel Scott Claim; and thence to the place of beginning; which land included in the said survey by the Probate Court, and within the said Lemuel Scott Claim, and within the said Joel Perkins Tract, is hereinafter for convenience of reference designated as the *Towvsite Tract;* and afterwards on the 19th day of April 1858, the County Commissioners of said County of Yamhill, having previously obtained permission from the Commissioner of the General Land Office therefor, entered the land so surveyed, embracing said Townsite Tract at the Land Office at Oregon City, as a Towsite, under said Townsite Law, of 1844; and that the Town of La Fayette in said County is located on the tract so entered.

Your orators further show, that on the 23d day of August, A. D. 1853, in order to settle and adjust the dispute and conflict which had arisen between said Lemuel Scott and said Joel Perkins, in consequence of the said Joel Perkins having included in his land claim as aforesaid a part of said Lemuel Scott Claim, the said Lemuel Scott and Joel Perkins entered into an agreement with each other, whereby the said Lemuel Scott agreed to relinquish unto the said Joel Perkins all the

right and claim which he, the said Lemuel Scott, then had to or upon any of the aforesaid lands lying within the said Notification of the said Joel Perkins, and west or south of a certain line then and there agreed to and pointed out by and to each other by the said Lemuel Scott and Joel Perkins, they going together over and upon said land for the purpose of locating said line; that said line agreed upon by them commenced at the point where the North Line of the said Notification of said Joel Perkins intersects the west line of said Lemuel Scott Claim, and ran thence south to the south line of said Lemuel Scott Claim; and thence east to the southeast corner of said Lemuel Scott Claim; and the said Joel Perkins by said agreement agreed to relinquish unto the said Lemuel Scott all of said lands lying east and north of said agreed line; that on the same day they attempted to reduce said agreement to writing, and that said Joel Perkins then represented that he knew and had correct information as to the courses, bearings and distances, by which to describe and locate said agreed line, by referring to and connecting it with the public surveys, and represented that a line commencing at a point 9 chains south and 32.50 chains west of the northwest corner of section 5 in Townships 4 south, Range 3 west, and thence projected south 78.50 chains, and thence east to the west line of John Bird's Donation Claim, would fall upon and coincide with the line so agreed upon; and that said Lemuel Scott, (**Record, folio 4**,) having no knowledge of the courses, bearings and distances to connect said agreed line with the public surveys, but relying wholly upon the said representaions of the said Joel Perkins, and supposing them to be true and correct, executed jointly with said Joel Perkins an instrument of writing purporting to be an agreement upon a line for the settlement and adjustment of said conflict, in which instrument said line was described and connected with the public surveys by the numbers. courses, bearings and distances given and stated by the said Joel Perkins as aforesaid; but that in fact said representations of said Joel Perkins, as to said courses, bearings and distances were wholly false, and

were made with the intention and for the purpose, as your orators are informed and believe, of deceiving said Lemuel Scott and of defrauding him and the said Caroline and your orators. And your orators say, that the line so described in said written instrument was not the line agreed upon between said Lemuel Scott and said Joel Perkins, but was 12.92 chains east of and parallel with the line so agreed upon, whereby there was included in the land described as relinquished to said Joel Perkins, as your orators are informed and believe, about 90 acres of land in the said Lemuel Scott Claim which was not in fact relinquished or to be relinquished by said Lemuel Scott, under the agreement actually made, as aforesaid.

And your orators further show that before said agreement was made, the said Lemuel Scott had completed his four years residence and cultivation of and upon said Lemuel Scott Claim, and had fully complied with the Donation Law, with relation thereto, but no patent or patent certificate had been issued for his said Land Claim; and that your orators Louisa J. Vance and Almedia Swan and said Caroline Scott were the owners of three-eighths of the land in fee, and that said agreement was wholly and in all respects null and void and of no effect as to the interests and rights of your orators and the said Caroline Scott in and to the land so agreed to be relinquished to the said Joel Perkins, and that said agreement was wholly void and of no effect as to the interest of the said Lemuel Scott in the land so agreed to be relinquished by him, because said agreement was never in writing, and that the said written instrument was and is wholly null and void by reason of the said fraud and false representations of said Joel Perkins aforesaid, by which the said Lemuel Scott was induced to sign said writing, which was not the agreement actually made between the said Lemuel Scott and the said Joel Perkins; and because the patent had not issued for said land; and your orators further show that no change of possession, residence or cultivation, or of other acts of ownership, was ever had, made or done by said Lemuel Scott, to, upon or about said 640 acres of land embraced in said Lemuel Scott

Claim, or any part thereof, in consequenee of said fraudulent agreement, or subsequent thereto.

And your orators further show, that shortly after said instrument of writing was executed as aforesaid, it having been executed in duplicate and each of the parties thereto having a copy, it was orally agreed upon by and between the said Lemuel Scott and the said Joel Perkins, that, in order to carry said agreement into effect, said Lemuel Scott should send his copy thereof to John B. Preston, who was then Surveyor-General of Oregon, and that if the said Surveyor-General would allow the said Scott to change his Notification so as to conform his boundaries to said agreement, it should be so changed, and in that case the said writing should be filed; but if the said Surveyor-General would not allow such change, then the said agreement was to be deemed and taken as abandoned by the parties thereto, (**Record, folio 5**) and wus thenceforth to be entirely disregarded and held for naught; and that in pursuance of said last named agreement the said Lemuel Scott did on the 27th day of August, 1853, transmit his copy of said writing by mail to said Surveyor-General (he the said Lemuel Scott not having at that time discovered the said fraud of the said Perkins with respect to the location of said line), and that the Surveyor-General refused to allow said change in the Notification of said Lemuel Scott, and returned said instrument of writing to said Lemuel Scott in person, notifying said Lemuel Scott at the same time of his refusal to allow said change.

And your orators further show, that some time afterwards, and after the said John B. Preston had retired from the said office of Surveyor-General, and another person had been appointed to said office and had entered upon the duties thereof, but the exact date your orators are unable to state, the said Joel Perkins wrongfully and fraudulently and without the consent of the said Lemuel Scott, presented to the Surveyor-General who succedeed John B. Preston, his, said Perkins' copy of said instrument of writing and caused the same to be filed with

the said last named Surveyor-General.

And your orators further show that on the 8th day of May A. D. 1854 the said Joel Perkins, falsely pretending that he had resided upon and cultivated the land described in his said Notifica- tion, including the land herein designated as the Joel Perkins Tract, for four consecutive years, from and after the 30th day of June, 1849, went before the Surveyor-General of Oregon and presented his affidavit stating that he had settled upon said land on the 30th day of June, 1849, and had resided upon and cultivated the same continuously for four consecutive years from and after said 30th day of June, 1849; and that on the said 8th day of May, 1854 the said Joel Perkins also procured one Daniel Johnson, his brother-in-law, and one E. Milliken, to make their affidavits to the same effect as his own affidavit above described, and presented the same to the said Surveyor-General along with his said affidavit and along with said instrument of date August 23d 1853, fraudulently obtained from said Lemuel Scott as aforesaid, for the purpose of having the title to the said lands notified upon by him as aforesaid, granted to him by the United States, as a Donation Claim under said Donation Law, and for the purpose of having the patent certificate therefor issued to him, and for the purpose of obtaining a patent therefor from the United States under the said Donation Law; bnt your orators say that said affidavits were false and fraudulent, and were procured and made for the purpose of deceiving the officers of the Land Office of the United States, and for the purpose of defrauding the said Lemuel and Caroline Scott and your orators out of the said lands included within both said Notification of said Joel Perkins and said Lemuel Scott Claim; and your orators say, that said Joel Perkins had not resided upon and cultivated said land or any part thereof for four consecutive years from said 30th day of June, 1849, nor for any four years continuously prior to the 8th day of May, 1854, and that he never did reside on or cultivate said lands or any part thereof for four consecutiue years, and that said Joel

Perkins was not residing upon said lands or any part thereof on said 8th day of May 1854, and that said claim of said Joel Perkins to said land was wholly false and fraudulent; and that the said Daniel Johnson and said Joel Perkins, as your orators are informed and believe, conspired and confederated together to make and procure false affidavits, for the purpose of defrauding the United States and (**Record, folio 6**) said Lemuel and Caroline Scott and your orators and securing the title to said Joel Perkins Tract, and that although said claim was made in the name of said Joel Perkins as a Dontaion Claimant, the said Daniel Johnson was, as your orators were informed and believe, interested with said Joel Perkins in obtaining the title to said lands, and in the benefits to be derived therefrom, and in procuring and making said false and fraudulent affidavits and presenting the same to the said Surveyor-General. And your orators further show that soon after the said false and fraudulent affidavits and said fraudulent instrument of writing were presented to the Surveyor-General as aforesaid, for final proof of residence and cultivation by said Joel Perkins on said tract, to wit, about the day of 1854, and before the said Lemuel Scott knew or was informed of the said filing or presenting of said false and fraudulent affidavits, or said fraudulent instrument of writing, said Joel Perkins left Oregon and never afterwards returned.

And your orators further show, that on the 2d day of March, A. D. 1855, and soon after the said Lemuel Scott was first informed of the filing and presentation of said false and fraudulent affidavits and said fraudulent instrument of
6 writing as aforesaid, the said Lemuel Scott filed with the Surveyor General and Register and Receiver of Oregon a written protest or remonstrance against the allowance of said false and fraudulent affidavits as final proof of residence and cultivation of said Joel Perkins Tract, by said Joel Perkins under said Donation Law, and against the granting of a Donation Certificate for said Tract to said Joel Perkins; in

which remonstrance or protest, the fact of said affidavits being false and frauduient was stated.

(**Record, folio 23.**) [And, thereupon, the said Lemuel Scott petitioned the register and receiver to re-examine and re-consider or examine further the said matter of final proof of residence and cultivation by said Joel Perkins, to the end that the claim and rights of said Lemuel Scott and of the heirs of his deceased wife might be secured and protected,

39 but that he was unable to get the register and receiver to decide upon his petition whether they would re-examine or re-consider, or examine further said matter, or to decide whether said pretended final proofs of residence and cultivativation by said Joel Perkins should be allowed as proof of said residence and cultivation.

That he requested and urged them to decide the said matter and file their decision so that he could regularly pursue his rights by appeal to the higher branches of the United States Land Office, as by law provided, but that the register abruptly replied: "Before I retire from the office of register I will write out a decision which will effectually close you out," and that said register and receiver never did render any decision upon the matter so presented to them by the said Lemuel Scott, and no decision was given upon the claim of said Joel Perkins, until the decision was given as hereinafter stated in the contest which arose out of the conflict of boundary between the Lemuel Scott claim, the Joel Perkins tract, and the town-site tract.

40 That at the time the county commissioners of said county of Yam Hill entered said town-site tract, as aforesaid, and on account of the conflict of boundaries between said town-site tract and said Joel Perkins tract, and between each of these two tracts and the said Lemuel Scott claim, the said Lemuel Scott and the heirs of the said Joel Perkins (**Record, folio 24**) (he having died before that time) were notified to make their contests for their said tracts respectively. But your orators were not notified thereof, nor of the entry of said town-site tract by said county commissioners, and never were in any way parties to said contests, or any of them.

That in pursuance of the said notice to the said Lemuel Scott and the heirs of said Joel Perkins, and in prosecution of their said contests, the parties began to take depositions of witnesses upon matters of fact involved in said contests, in accordance with the usual practice in such cases in the Land Office. But as soon as the depositions of the witnesses called in support of said town site entry were taken and before the depositions of the witnesses called on behalf of said
41 Lemuel Scott were taken, the depositions so taken in support of said town site entry were transmitted to the register and receiver, who forthwith proceeded to hear and decide said contest, without having evidence on the part of said Lemuel Scott on behalf of his said claim, and decided that said town-site entry should be allowed, and that the claim of said Lemuel Scott to that part of the said Lemuel Scott claim which is embraced within the said town-site tract should be disallowed and rejected. That shortly thereafter said Lemuel Scott requested and petitioned the register and receiver to re-open and re-hear said contest, in order that evidence on behalf of said Lemuel Scott and in support of his said claim might be taken and heard, but the said officers refused to grant said request and petition. That thereupon the said Lemuel Scott petitioned the Commissioner of the General Land office of the United States for an order requiring said register and receiver to re-open said contest and allow said Lemuel Scott to produce evidence in support of his said
42 claim, and the Commissioner of the General Land Office upon said petition, made an order directing said contest to be re-opened as prayed for by said Lemuel Scott.

That a re-hearing of said contest was had before the register and receiver, and that on such re-hearing, in addition to the false and fraudulent evidence hereinbefore referred to, such further false and fraudulent evidence of residence upon and cultivation of said Joel Perkins was produced by the heirs and representatives of said Joel Perkins for the purpose of deceiving the officers of the Land office of the United States and defrauding the said Lemuel Scott and Caroline

Scott and your orators, as that the Register and Receiver of the Land Office, to wit: on the first day of February, 1862, decided that the said Joel Perkins or his heirs were entitled to receive patent certificate for all said Joel Perkins' tract except that part thereof which is included in the town-site tract as hereinafter stated.

That the said Lemuel Scott, within the time allowed by law for that purpose, duly appealed from the decision last aforesaid to the Commissioner of the General Land Office
43 and that he employed one J. T. Neeley, an attorney then practicing as such at Washington City and before the Land Office there, to present his said appeal before the Commissioner; but that previous to or about the time said appeal was transmitted to the Commissioner by the Register and Receiver from whose decision said appeal was taken, said J. T. Neeley, as your orators are informed and believe, abandoned his employment upon said case of said Lemuel Scott in prosecuting said appeal, left the city of Washington and went into the States which were then in rebellion against the Government of the United States and joined the rebellion of said States, without notifying the said Lemuel Scott of his intention to do so; (**Record, folio 25**) and your orators are informed and believe said Lemuel Scott had no notice or information of the said abandonment of his said business by said Nealey nor of said Nealey's departure from Washington City, until after said Commissioner had given his decision upon said appeal as hereinafter stated.

That during the time said States were in rebellion and
44 for more than a year thereafter, the business of the Land Department of the government at Washington City being greatly delayed, hindred and confused by and on account of said rebellion, the said Lemnel Scott supposed that the determination of his said appeal was delayed thereby, and that his appeal would be determined as soon as it could be reached in its order, and that he was all the time relying

upon said Neely to prosecute his said appeal and to attend to all matters pertaining thereto, but your orators say, that in transmitting said appeal to the Commissioner of the General Land Office, the register and receiver from whose decision said appeal was taken, failed and omitted to transmit therewith all the evidence which had been offered, introduced, and used on the hearing of said testimony before them, and that a large number of original depositions, exhibits, and documents introduced and used in evidence before the register and receiver on the hearing of said contest were never transmitted.

45

That among said depositions, exhibits, and documents which were not transmitted to the said commissioner were some which had been taken, introduced, and used on behalf of said Lemuel Scott on the hearing of said contest before the register and receiver, and which strongly supported the claim of said Lemuel Scott in said contest; and that, as your orators are informed and believe, the said Lemuel Scott was wholly ignorant of the omission to transmit said depositions, exhibits and documents, and fully supposed, until within one year last past, that all the depositions and evidence used in the contest before the register and receiver had been duly transmitted along with said appeal; and your orators say—

That the Commissioner of the General Land Office, on the second day of March, 1866, having before him only a part of the evidence which had been used upon the hearing of said contest before the register and receiver, and not having before him any of the depositions, exhibits, and documents which the register and receiver had failed as aforesaid to transmit, the said Lemuel Scott not being represented there in person or by attorney, proceeded to hear and determine said appeal, and then affirmed the said decision of the register and receiver.

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That the said Lemuel Scott, upon being notified of said

decision of the Commissioner, duly appealed from the said Commissioner to the Secretary of the Interior, and employed attorneys to prosecute his said appeal, and that such further proceedings were had that, on the 9th day of September, 1868, the Secretary of Interior having before him only the evidence which had been transmitted to the Commissioner with said appeal from the register and receiver, and not having before him the evidence which had been omitted as aforesaid to be sent to the Commissioner, proceeded to hear and determine said appeal, and then affirmed said decision of the Commissioner and of the Register and Receiver;] and the certificate for patent was granted in accordance with the said decision (**Record, folio 6, 28 line**); and that subsequently, to wit, on the 14th day of March, A. D. 1872, as yonr orators are informed and believe, a patent was prepared and signed by the proper officers of the United States, purporting to grant the lands so notified upon by said Joel Perkins as aforesaid unto the said Joel Perkins and his wife and their heirs respectively, the east half thereof, including a part of the said lands embraced in the notifications of said Joel Perkins and said Lemuel Scott, to the wife of said Joel Perkins and her heirs, and said west half thereof, embracing the remainder of said lands so included in both notifications to said Joel Perkins and his heirs; but that said patent has not been delivered to the said patentees nor to any person or persons claiming said lands, but remains still in the hands of the officers of the land office of the United States and undelivered.

And your orators further show that said Lemuel Scott did not discover or know of the fact that said instrument of writing of date August 23d, 1853, did not correctly describe the line of division agreed upon between him and said Joel Perkins as aforesaid, or that said representations of said Joel Perkins upon which the description of said line was set forth in said instrument of writing were false until some time after the said 2d of March, 1855, and had not discovered the said

facts when he filed with the surveyor-general and register and receiver the said remonstrance or protest of March 2d, 1855, as aforesaid.

And your orators further show that on or about the day of November A. D. 1859, the said Lemuel Scott received notice from the surveyor-general of Oregon that one Charles Handley had been appointed deputy surveyor of the United States, to make a final survey of the said Lemuel Scott donation claim, and that in persuance of such notice said Lemuel Scott employed and paid said Charles Handley to make the final survey of his said claim, (**Record, folio 7**), and on or about the day of December, 1859, 7 said Charles Handley did make said final survey, and did thereupon return his field notes of such survey to the office of the surveyor-general in accordance with the requirements of the law in relation thereto; and that thereupon the said Lemuel Scott, on the day of , 1860, made and filed with the register and receiver of the land office at Oregon City, further and additional, full and complete proof of his residence and cultivation of the said Lemuel Scott claim, and of the whole thereof for the entire period from the said 20th day of July, 1848, to the day of 1858, and 7 again demanded the issuance of the patent certificate therefor, for the entire tract of 640 acres, and the designation of the parts of said claim which should enure to him, and to the said Mary Jane Scott and her heirs, respectively; but the Register and Receiver then refused to issue said certificate or to make the division of said Claim, on account of the aforesaid confiict with said Joel Perkins, and on accounl of the conflict between his, said Scott's Claim, and the said Townsite entry.

And your orators further show, that some time after the year 1866, but the exact date your orators have not ascertained, a patent was issued to the County of Yamhill for said tract entered as a Townsite as aforesaid, upon the trust specified in said Townsite law of 1844 for the occupants thereof.

And your orators further show, that said Caroline Scott died intestate on the 28th day of August, 1864, in the State of Nevada, leaving the said Lemuel Scott her sole heir at law; and that said Lemuel Scott, on the 15th day of October, 1877, by his deed of that date, granted and conveyed unto your orators Louisa J. Vance and Amelia Swan, as tenants in common, all his right title and interest of, in and to all that part of said Lemuel Scott Claim which is embraced and included within the said Joel Perkins tract, and all that part of the said Lemuel Scott Claim which is embraced and included within the said Townsite tract.

And your orators further show, that the defendant, A. R. Burbank, is in possession of, and claims to own, under and through a chain of conveyances from the wife of said Joel Perkins, and under and through the said fraulently procured Donation by the United States to said Joel Perkins and wife, a tract of land lying within said Lemuel Scott Claim, bounded as follows: Commencing at a point 320 feet South 17 degrees West, from an iron stake, which bears from a point 50 links North, and 17-74 chains South 75 degrees East, from the Southwest corner of Section 6 in Township 4 South, Range 3 West of Wallamet Meridian, and running thence South 17 degrees West 200 feet; thence West at right angles 220 feet; thence South to the South line of said Lemuel Scott Claim; thence East along the said South line of said Lemuel Scott Claim, to the Southeast corner of said Lemuel Scott Claim; thence North 23 degrees East, along the East line of said Lemuel Scott Claim to a point 5-72 chains South of the line between Sections 6 and 7 in Township 4 South, Range 3 West of Wallamet Meridian; and thence westerly along the North side of the county road leading from the town of La Fayette to the town of Dayton, in said Yamhill County, to a point due North from the place of beginning; thence South to the place of beginning.

And your orators further show that the defendant, Thomas Heuston, is in possession of a tract or parcel of land lying

within said Joel Perkins Tract, and within said Lemuel Scott Claim, described and bounded as follows: Commencing at a stake on a meridian line running 32-50 chains (**Record, folio** 8) West of the Northwest corner of Section 5 in Township 4 South, Range 3 West, and being the northeast corner of a tract of land surveyed on the 19th day of September, 1877, by Charles Handley for Edgar Poppleton, and described in a deed executed by said Lemuel Scott and others to said Edgar Poppleton, bearing date the 6th day of October, 1877, and running thence North 29-06 chains to a stake for Northeast corner; thence North 73 degrees West 20 chains to a stake; thence South 29 chains to a stake; thence East 3-50 chains to a stake; thence South to the line of the county road leading from La Fayette to Portland; and thence to the place of beginning; being part of Section 6 in Township 4 South, Range 3 West, and containing 60 acres more or less; and that said Thomas Heuston claims to be the owner of said tract or parcel of land, so possessed by him, under and through a chain of
8 conveyances from the wife of said Joel Perkins, and through and under the said falsely and fraudulently procured Donation by the United States to said Joel Perkins and wife.

And your orarors further show that the defendant J. L. Ferguson is in possession of a tract or parcel of land lying within said Joel Perkins Tract, and within said Lemuel Scott Claim, described and bounded as follows: Commencing at a point being the southeast corner of a tract or parcel of land surveyed by Charles Handley on the 19th day of September, 1877, for E. Poppleton, and described in a deed from Lemuel Scott and others to said E. Poppleton, bearing date the 6th day of October, 1877, and running thence west 13.46 chains; thence south 11.88 chains; thence south 74 degrees, east 12 chains; and thence to the begnining, and containing 21 acres more or less; and that said J. L. Ferguson claims to be the owner thereof, through and under a chain of conveyances from the wife of said Joel Perkins, and through and under

the said fraudulently and falsely procured Donation from the United States to said Joel Perkins and wife.

And your orators further show that the defendant Bartlett Whitlow is in possession of a tract or parcel of land lying within said Joel Perkins Tract, and within said Lemuel Scott Claim, bounded and described as follows: Commencing at a point on the north side of county road leading from said town of La Fayette to Portland, at the southwest corner of the Tract of which the defendant Thomas Heuston is in possession, as hereinbefore described, and running thence north on the west line of said tract held by said Thomas Heuston, to a stake in an inner angle of the said tract held by said Thomas Heuston; thence west on the line of said tract held by said Thomas Heuston; 3.50 chains to a stake; thence north 29 chains to a stake; thence north 73 degrees, west 10.60 chains; thence south to the north line of said Tract surveyed by Charles Handley for Edgar Poppleton, as hereinbefore stated; thence east to the northeast corner of said Tract surveyed for said Poppleton; thence south with the line of said Tract surveyed for said Edgar Poppleton, 6.81 chains to the north side of the county road last aforementioned, and thence along the north side of said county road last aforementioned to the place of beginning; and that said defendant Bartlett Whitlow claims to be the owner of said Tract of land so held by him, through and under said fraudulently procured Donation from the United States to said Joel Perkins and wife.

And your orators further show that at divers times heretofore the defendant the County of Yamhill, by its County Court and County Commissioners, has pretended to sell divers lots and blocks in said town of La Fayette to other of the defendants and of other persons, and has made deeds and conveyances thereof to such defendants and other persons; and that such defendants are now in possession of said lots and blocks for which conveyances have been so made, as your orators are informed and believe, as follows: The defendant A. R. Burbank is in possession of lots three

(3) and four (4) in block seven (7), lot three (3) in block forty (40), lot one (1) in block seventy-two (72), and lots one (1), and two (2), and three (3), in block sixty-eight (68): The defendant Thomas Heuston is in possession of lots three (3) and four (4) in block thirty-four (34): The defendant Daniel Johnson is in possession of lot (6) in block six (6), lot three (3) in block thirteen (13), and lots three (3) and [4] in block thirty-two [32]: The defendant J. N. Belcher is in possession of lots [1], two, three [3], five [5] and six [6] in block sixteen [16], and all of block forty-five [45]: The defendant M. J. Bird is in possession of lot three in block sixty-two [62]: The defendant R. P. Bird is in possession of lots five [5] and six [6] in block fourteen [14]: The defendant John Bird is in possession of lot four [4] in block fourteen (14), all of block twenty-seven (27), and lot one (1), five (5) and six (6) in block forty-seven (47) ; [9] The defendant, Jacob Grazier, is in possession of all of blocks thirty-five (35), thirty-six (36) and sixty-six (66) and lots four (4), five (5) and six (6) in block sixty-seven (67): The defendant Harrison Allison is in possession of lots one (1), two (2), four (4) and five (5) in block forty (40): The defendant J. J. Butler is in possession of lot five (5) in block sixty-two (62): The defendant E. C. Bradshaw is in possession of all of block forty-one (41): The defendants Daniel Johnson and Jacob Grazier are in joint possession of lots one [1] and two [2] in block fifteen [15]: The defendant Hull Johnson is in possession of the southwest thirty [30] by seventy-six [76] feet of lot six (6) in block six (6), being a rectangular piece of land thirty [30] feet north and south and seventy-six (76) feet east and west: The defendant James A. Campbell is in possession of lot four [4] in block nineteen [19], lot one [1] in block five [5], lot one [1] in block eight [8] and lot one [1] in block fourteen [14]: The defendant Jessee Dixon is in possession of lots two [2] and five [5] in block seven [7]: The defendant J. W. Dunn is in possession of lot four [4] in block thirty-one [31]: The defendant C. F. Royal is in possession of lots one [1] and six [6] in block forty-two [42]: The defendant J. W. Watts is in possession of lots one [1], three [3],

four [4], five [5] and six [6] in block five [5], lots one [1] and three [3] in block six [6], and lots four [4], five [5] and six [6] in block seventy-two [72]: The defendant K. B. Mercer is in possession of all of blocks forty-three [43] and forty-four [44]: The defendants Josiah Nelson and Robert Bird are in joint possession of the east thirty [30] by one hundred [100] feet of lot five [5] in block seven [7], being a rectangular piece of land thirty [30] feet east and west by one hundred [100] feet north and south: The defendant W. F. Perkins is in possession of lot two [2] in block two [2]: The defendant Geo. M. Perkins is in possession of lot six [6] in block thirteen [13]: The defendant G. W. Perkins is in possession of lots three [3], four [4], five [5] and six [6] in block seventeen [17]: The defendant E. D. Perkins is in possession of lots four [4] and five [5] in block six [6]: The defendant A. H. Roberts is in possession of lots one (1) and six (6) in block thirty-six (36): The defendant H. Hurley is in possession of lots one (1), two (2), three (3), five (5) and six (6) in block thirty-one (31): The defendant Matthew Patton is in possession of lot four [4] in block twenty-one [21] and lot two [2] in block sixty-two [62]:

The defendant Aaron Frazer is in possession of lots two [2] and three [3] in block sixty-eight [68]: The defendant Joseph Heuston is in possession of lot five [5] in block thirty-four [34]. And your orators further show that each and all the lots and blocks so in possession of the said defendants, respectively, lie within said Joel Perkins Tract; and within said Townsite Tract, and within said Lemuel Scott Claim, and that the said defendants so in possession thereof, as your orators are informed and believe, claim to be the owners of said lots and blocks so in their possession, the said Jacob Grazier and Daniel Johnson claiming to be tenants in common, in fee, of the land so in their joint possession, the said Josiah Nelson and Robert Bird claiming to be tenants in common, in fee, of the land so in their joint possession, and the said Jesse Dixon, and the defendant L. A. Dixon, who is his wife, claiming to be seized in fee of said land so in his pos-

session of lots and blocks, and claiming title thereto, derive their chains to such title from said county of Yamhill, and through and under said Townsite Entry, some of them by conveyances therefor immediately from said county, and others by chains of conveyances from said county through the other persons whom conveyances have been made as aforesaid [10] and that, as your orators are informed and believe, the said county of Yamhill has pretended to sell, and has made pretended conveyances of still other lots in said town of La Fayette and lying within said Joel Perkins Tract, and within Townsite Tract, and within said Lemuel Scott Claim, but your orators are not sufficiently advised to state to whom or for what other lots such conveyances have been made. And your orators are informed and believe that some of the defendants who are in possession of lots and blocks as aforesaid, claim, in addition to their said claim of title under said county of Yamhill, and under said Townsite Entry, to have derived some right or title to such lots and blocks from and under the said fraudulently procured Donation from the United States to said Joel Perkins, by deeds from said Joel Perkins or his wife or heirs; but your orators are not sufficiently advised to be able to state which of the defendants do claim to derive title or right from or under said fraudulently procured Donation to said Joel Perkins, or the lots or blocks to or for which such title or right is claimed.

And your orators further show that the said defendant the county of Yamhill is in possession and claims to be the owner under said Townsite Entry upon the trusts specified in said Townsite Law of 1844, of all that part of said Townsite Tract excepting what it has pretended to sell and convey as hereinbefore stated, and which unconveyed portion amounts to about forty (40) acres, as your orators are informed and believe, but your orators are not sufficiently advised to state the exact amount thereof.

And your orators further show that, as they are informed

and believe, the said Joel Perkins is dead; that his wife survived him; that all his heirs are over the age of twenty-one years, and that his widow and heir have all ceased to be interested in said Joel Perkins Tract, or any part thereof, and have executed conveyances therefor to divers persons, under whom those of the defendants claim who claim to derive their titles or rights from the said fraudulently procured Donation to said Joel Perkins as aforesaid; that neither the widow nor the heirs of said Joel Perkins have any interest in the event of this suit.

11 And your orators show that all said claims of title or right to said lands and every of them, by said defendants, are wholly unjust and inequitable; that said Donation to said Joel Perkins and wife were and are wholly fraudulent as to the said Lemuel Scott and wife and your orators, and ought in equity to enure your orators as the heirs of said Mary Jane Scott, and as the grantees of said Lemuel Scott; that said Townsite Entry was wholly inequitable and wrongful so far as it embraced said lands within said Lemuel Scott Claim; that said Lemuel Scott was entitled in equity and justice to a patent certificate and patent for said Lemuel Scott Claim long before said Townsite entry was made; and that as your orators are informed and believe, and so charge the fact to be, the defendants and each of them, and all the persons from and through whom they respectively claim to derive their titles to the land claimed by them as aforesaid, have at all times had notice and knowledge of the rights of the said Lemuel Scott and wife and of your orators, and of the said fraud, and of the compliance by said Lemuel Scott with the Donation Law as aforesaid, and of the failure of said Joel Perkins to comply with the Donation Law, and of the illegality and injustice of the said Townsite Entry.

And your orators further show that the value of the lands in controversy in this suit exceeds five thousand dollars.

The defendants filed a demurrer to the bill, which demurrer the Circuit sustained, and decreed that the bill be dismissed with costs, but filed no written opinion. The complainants appeal from that decree.

ARGUMENT.

The demurrer (**Record, folio 26**) contains thirteen separate specifications of reason why the bill should be dismissed; but the grounds of demurrer may be discussed under four general heads.

The *first* and *second* specifications in the demurrer (**Record, folio 26**) raise the question whether the facts stated in the bill are sufficient to constitute a cause of suit, provided there is no special circumstances constituting a bar to the granting of relief; in other words, whether, independently of the question of lapse of time, and of the exclusive jurisdiction of the Land Department over the matters stated, there is equity in the bill.

And this question is seen upon a mere inspection of the bill to require division, for the claim to that part of the land which comes to the complainants through the donation of the Government to Lemuel Scott stands upon grounds differ-

ent from those on which their claim rests to that part which came through the donation to Mary Jane Scott, his wife. Let these two divisions of the question be examined separately.

1. Is there any equity in the bill as to that part of the land which is claimed by the complainants through the donation to Lemuel Scott himself; that is, his half of the Donation claim? A bare statement of the facts set forth in the bill touching this point makes argument unnecessary to sustain the claim of the complainants. Lemuel Scott was an occupant of the land when the Donation Act was passed (September 27, 1850,) was qualified to take the grant made by that act, and proceeded to comply with the act, so as to entitle himself to the land embraced in the "Lemuel Scott Claim." Joel Perkins, subsequently to the settlement of Scott, and after the passage of the Donation Act, set up a claim to a tract embracing a part of Scott's land, and subsequently, without compliance with the Act, made a deed purporting to convey a part of Scott's claim to the Commissioners of Yamhill county.

Then the County Commissioners (or Probate Court) entered the land so deeded to them under the Townsite Act of 1844; and Perkins procured persons to make false affidavits of compliance by him with the Donation Act, and purposely deceived the officers of the Land Office thereby and procured the recognition of his claim to that part of Scott's land which was embraced within the Perkins' claim, and defrauded Scott out of it. Meanwhile, in order to settle and adjust the dispute and conflict which had arisen on account of the claim set up by Perkins to a part of Scott's land, Scott agreed with Perkins that he Scott would give up a part of his land, and the two went upon the land and there mutually pointed out and agreed upon a compromise line (which is shown on the plat

as the "true compromise line") and this compromise was to be reduced to writing, and was to be in force only in case the Surveyor General would allow Scott to change his notification so as to make his boundaries conform to the compromise. But when they came to reduce the agreement to writing, Perkins by false representation as to where the compromise line was located with reference to public surveys, purposely and fraudulently got the line so described in the writing as to move his own boundary further east than had been actually agreed upon, so as to make the boundary between him and Scott lie at the line shown on the plat as "the false compromise line," and thus to defraud Scott out of about ninety acres of land, which by the agreement between them was to belong to Scott. Then, further, the Surveyor General refused to permit Scott to change his boundaries so as to carry the compromise into effect, upon which refusal, by the terms of the agreement the compromise was to be deemed abandoned. But that Surveyor-General soon after went out of office, and upon his successor's coming in, Perkins, in violation of said agreement, clandestinely and without Scott's knowledge, went before the new officer, presented a copy of the fraudulent agreement, and got himself recognized as the lawful claimant of the land as far east as the "False Compromised Line." With these initiatory steps, upon this foundation and by these means, and by false affidavits and the suppression of evidence before the Land Department, Perkins and his representatives have procured the patent to be ordered to them for all that part of the Scott Claim lying west of the "False Compromise Line," except that which was entered as a Townsite.

Such are, in substance, the allegations of this bill, and the demurrer admits them to be true. It would seem like a waste

of time to argue that these facts are sufficient, in the absence of any special matter in bar, to warrant the interposition of a court of equity for the relief of Scott or his representatives as against Perkins and his heirs.

Meador vs. *Norton*, 11 Wall., 442.

As to that part of the Lemuel Scott Claim which Perkins attempted to convey to the Commissioners by his deed of May 1850, he could not have complied with the law, even if he had done so as to the rest of the disputed land, for his deed, though at that time he had no title to convey, was as to that land an abandonment of his occupancy as a Donation claimant.

The bill does not shew the date of the Townsite entry, but it shows (**Record folio 1**) that Scott's four years' residence and cultivation had been completed, and his proof thereof made, long before July 14, 1854, which was the earliest date at which an entry under the Townsite Act could be made.

Stark vs *Starrs*, 6 Wall, 402.

Scott was therefore, according to the allegations of the bill, a prior donee of the land notwithstanding the patent had not been issued to him; the entry under the Townsite Act was wrongful as to him; and the patent issued to the County authorities under that entry, enures to the benefit of him and his representatives. He or they have, therefore, a complete cause of suit against the County of Yamhill for so much of

the land in dispute as is still held by the county.

Stark vs *Starrs*, *ub. sup.*

Whitlow vs *Rees*, 4 Or. 335.

It only remains, under this branch of the case, to call attention to the allegations of the bill, that all the other defendants, (who hold under Perkins and the County) and all intermediate tenants of their respective titles, have at the times of their taking the lands, and at all times, had full notice and knowledge of the facts alleged against Perkins and the county (**Record, folio 11**). They are all, therefore, chargable in like manner and to the same extent as Perkins and the county.

Barker vs *Bliss*, 39 N. Y., 70.

This, I submit, disposes of *first* and *second* specifications in the demurrer, as to that part of the land which is claimed as coming through the donation of the Government to Lemuel Scott himself, upon principles so entirely elementary, or so well settled, that an apology seems due for citing authority in their support.

2. Is there equity in the bill, as to that part of the land in dispute which is claimed as the wife's portion of the Lemuel Scott claim?

What has been said in support of the bill as to the husband's part of the claim, applies with equal force to the wife's part, if

she ever had any part. But it is contended that she took nothing by the Donation Act, because she died before her husband filed his notification designating the boundaries of the tract claimed,

The case of *Fitzpatrick* vs *DuBois*, (2 Sawyer 434) was relied upon in the Court below to support that position; and, as I understood, the law was so held by the Circuit Judge upon the authority of that case—thongh in this I may have misapprehended the decision, as no opinion was filed. I concede that the reasoning of His Honor Judge Deady in the case of *Fitzpatrick* vs. *Dubois* appears to be founded upon such a construction of the law; but the facts in this case were in very important respects unlike those of the present case. There the wife had deserted her husband, and he had obtained a divorce from her. In the present case the wife was living on the land claim with her husband, from the 20th of July 1848, to the 9th day of April, 1851, when she died. (**Record, folio 2.**) This certainly places the claim of her representatives upon very different and much higher ground, morally than that of the divorced wife in the case of *Fitzpatrick* vs. *Dubois*; and the Commissioner of the General Land Office thought there was also a legal difference, for he said, as quoted in *Fitzpatrick* vs. *Dubois*, that the wife in that case lost her right under the Donation Act "by abandonment" of the land and "disclaimer of any right therein"—that is, the decision against her, in the General Land Office was placed upon the ground of her voluntary renunciation of her right. And although the learned judge who decided the case of *Fitzpatrick* vs. *Dubois* did lay down the rule that no one could take as wife who was not wife at the time of Notification, it is manifest he was consider-

ing the question with relation only to the case before him—the case of a person still living, but who had ceased to be the wife of the settler before the notification was filed. Indeed, he presented, as an argument in support of the rule there laid down, the consideration that the divorced wife, being after the divorce a *feme sole*, might still become a settler and hold land under the Donation Act, in her own right, citing in support of this argument *Silver* vs. *Ladd* (7. Wall., 226.) It is needless to say that neither the argument of voluntary "abandonment" by the wife, nor that of her right to take another claim as a *feme sole* can have any application to the present case.

But if the language of the Court in *Fitzpatrick* vs. *Dubois* is to be understood not merely as the statement of a rule applicable to the peculiar circumstances of that case, but as laying down for all cases, the rule that the grant made by the Donation Act never takes effect as to the wife of the settler unless she is his wife at the time the Notification is filed, then, with great deference to the learning and ability of the Judge who decided that case, I humbly submit that the rule there laid down is erroneous; and it will, I think, be found to be erroneous, whether it be examined in the light of judicial decisions, made under the Donation Act, or viewed as an original question upon the construction of that Act.

It has been frequently and uniformly held, both by the Circuit Court for the District of Oregon, and by the Supreme Court of the State, that the grant made by the Donation Act took effect *in presenti*, and passed the title immediately to those whose settlement had begun before the passage of the

Act; subject only to be determined or defeated by the subsequent failure of the settler to complete his compliance with the requirements of the Act.

Chapman vs *School District*, Deady's Reports, 112.

Lamb vs *Davenport*, 1 Sawyer, 632.

Lee vs *Summers*, 2 Or., 266.

Blakesley vs *Cawood et al.*. 4 Or., 279.

Dolph vs *Barney*, 5 Or.. 191.

The correctness of these decisions is abundantly sustained by the decisions of this court upon cases arising under other statutes, and, so far as I am aware, has never been seriously questioned.

But the bill alleges (**Record, folio 1**) that Scott was at the time the Donation Act was passed, and had been ever since the 20th day of July, 1848. a settler upon and claimant of the tract of land called in the bill the Lemuel Scott Claim, and embracing the land in controversy, and that he resided upon and cultivated the land continuously, from July 20th, 1848, till February, 1861—nearly thirteen years; and (**Record, folio 2**) that during all that time from his settlement in July, 1848, to the date of her death, in April, 1851, his wife lived with him upon the land.

According to the decisions above cited therefore, the Donation Act was a present grant of the title to that tract of land.

To whom was the land granted?

In whom did the present grant made by the statute vest the title to the land?

Section 4 of the Act furnishes an explicit answer :

There shall be and hereby is granted to every white settler or occupant of the public lands * * * * * the quantity of one-half section * * * * if a single man, and if a married man * * * * * the quantity of one section * * * * *one half to himself and the other half to his wife, to be held by her in her own right.*

The wife's title to her half of the tract vested in her at the same moment and in the same manner as the husband's title to his half vested in him. No matter how large or how small the tract might be on which he made his settlement, half the tract was hers by the statute; for, being a married man, he could not take the grant to himself alone, or as a single man.

Field vs *Squires*, Deady's Reports, 366.

Jette vs *Picard*, 4 Or., 296.

Nor was the wife of Scott required to do anything to comply with the law except to be his wife when the title vested in him.

Lamb vs *Starr*, Deady's Reports, 362.

Vandolph vs *Otes*, 1 Or., 153.

Her title was liable to be divested by failure of her husband to comply with the law, but that is the only way in which it

could be divested; and the bill alleges that her husband did comply with the law; so her title became an absolute and indefeasible fee, dating not from the time of the notification, but from the time of the statutory grant to her—the grant in *presenti*. This appears to me to be an inevitable conclusion from the two well established principles above referred to—(1) that the statute *proprio vigore* vested the title in the settler and his wife, and (2) that that title became indefeasible upon the husbands complying with the requirements of the Act.

But the Court, in *Fitzpatrick* vs *DuBois*, apparently perceiving the inconsistency of the rule then laid down with the other decisions above referred to, which had been made by the Judge who decided that case as well as all the other Judges before whom the questions had come, sought to escape from it through the doctrine of relation.

The learned judge says, in substance, that while it is true the Donation Act made a present grant, still that grant did not in fact take effect till the settler filed his Notification in the Land Office, and upon the filing of the Notification the grant immediately took effect, and by relation should be deemed to have been in effect from the date of the passage of the Act. The whole doctrine of relation is a legal fiction, by which a thing is assumed to have been done before it was in fact done, and its purpose is to prevent frauds and wrongs which would be done by allowing the transaction or event to which it is applied to stand as upon its actual date; and there is no occasion for its adoption as a part of the law of every Donation claim, without regard to whether its application will affect any right claimed by either of the parties, or innocent third persons, or not. The more natural construction of the statute is

that it means just what all the courts have said it means, namely that it makes a *present* grant of a qualified fee, taking effect immediately, and liable to be determined at a future time by failure to comply with its requirements, and not that it makes a grant to take effect in future and then to reach back to the present.

But the rule in *Fitzpatrick* vs. *DuBois* says in substance the Act did not, in fact, in any case make a present grant; for when the Act took effect the public surveys had not been extended over an acre of the public lands in Oregon; and the extension of the public surveys being necessary before Notifications by the settler (Donation Act, § 6) not a single settler was then, or could be for some time afterwards, in a position to receive the grant, the Act did not in fact make a grant *in presenti* to any settler in Oregon.

The rule, as laid down in *Fitzpatrick vs. DuBois*, is therefore. that the Donation did not in any case make a present grant of a qualified fee, but provided for a grant to take effect in the future upon a precedent condition, not a subsequent condition of defeasance as the other cases hold, which grant when once vested should in all cases and for all purposes be held by the Courts to have existed from the date of the act of relation. (64)

But suppose it were conceded that such is the true interpretation of the Act, the conclusion deduced therefrom by the Court in *Fitzpatrick* vs *DuBois* is, I humbly but confidently submit, as illogical as the fiction on which it is based is unnecessary. If upon the filing of the notification the title to

the land vested by relation from the date of the Act, did it not so vest because the Act had made the grant to persons then on the land and according to their condition—married or single—at that time? "There shall be and hereby is granted * * * * if a married man, * * * * *one-half to his wife.*" If it is a present grant to the husband because of his occupancy at the time the Act was passed, it is a present grant to the wife, because of her wifeship at that time. And if the grant only vests subsequently, but relates back to the date of the Act, because the husband was an occupant at that date, it relates back to that date as to the wife who was his wife at that date, wifeship being as to her the meritorious consideration for the qualified fee granted, while occupation is the meritorious consideration as to him, the meritorious consideration in both husband and wife being referred by the Act to the same date.

Suppose Lemuel Scott had, at the time he filed his notification, claimed 320 acres as an unmarried man, in virtue of his settlement in 1848 and his occupancy in 1850 when the Act passed, at both of which dates his wife was living with him, it will hardly be contended that he could have thus taken the grant to himself alone; for while his settlement and occupancy at the time the Act was passed made him the grantee from that moment, his being a married man imposed upon him the disability to take the grant as a single man. His settlement was the settlement of a married man, his occupancy at the time the Act was passed was the occupancy of a married man, and his notification referred to that settlement and to that occupancy as the basis of his right to the land; and if title vested in him upon notification by virtue of that settlement and occupancy and taking effect by

relation as of the time when the Act was passed, it vested in his wife also from the same date.

The conditions annexed to the grant being, as held in all the cases except *Fitzpatrick* vs *DuBois*, conditions of defeasance, and not, as held in this case, conditions precedent to the vesting of the title in the grantee; the fatlure of the conditions cannot defeat the estate in part, leaving it good for the residence. This is an elementary proposition for which no authority need be cited; and if it be sought to avoid ifs application by reason of the grant being of two estates, one to the husband and one to the wife, and the defeasance being claimed of one of those estates entire, the sufficient reply is, that while the grant was to two persons and therefore there were in law two estates; still the two estates were created by a single grant, and were themselves in all respects common to both grantees before division, and depended for their continuation upon single and inseparable conditions to be performed by one of the parties; and, so far as affected by the conditions the estates were in fact but one.

The claim of Mrs. Scott's heirs is, I think, also strongly supported by the general context of the entire Act, the spirit and intent of which is that persons qualified to take the grant and who have complied in part, and who are proceeding to full compliance shall not lose the benefit of the Act by death, but their representatives, in their lines and proportions prescribed by the Act, shall have the right to the land upon this event. In other words, death, while in the course of compliance shall be substituted for compliance, excepting as to the

matter of "proving up," which may be done by the representatives. This is apparent from the fourth section, which makes provision for the descent or course of the title upon death after completing residence and cultivation required and before patent issues; and, still more clearly, from the eighth section which makes similar provision in case of death before the completion of the residence and cultivation.

The bill alleges that Mrs. Scott died in 1851, after the passage of the Donation Act. Her husband had complied with the requirements of the Act in all respects up to that date. True, he had not filed his Notification; *but he could not do it, because the Government had not extended the public surveys over the land.* He did file his Notification on the 9th day of October, 1852, *which was within three months after the survey.* **(Record folio 2).** The Government, then, having by its delay in making the survey, rendered it impossible for Scott to perform the condition of Notification until after his wife's death, is excluded by a familiar rule of law, from claiming that her estate was defeated by his failure to perform this condition during her life. Suppose the public surveys to have been delayed ten, fifteen or twenty years (as they have been upon much land in Oregon) and both Scott and his wife had died within that time, after having made full compliance with the Act as to settlement, residence and cultivation, leaving only the conditions of Notification and final proof, unperformed, the performance of both those conditions being all the time impossible by reason of the Government failing to have the land surveyed; would it be contended that the heirs of Scott and wife would not, as against the grantor, have the right to perform these conditions by giving notice, after the

survey, of the tract settled upon, claimed and cultivated by their ancestors, and then making proof of full compliance, and thereupon to have the patent issued to them for the land. To hold them excluded from this right by the failure of their ancestors to perform conditions thus rendered impossible by the delay of the Government would be held contrary to reason and justice, contrary to a well settled rule of law, contrary to the manifest spirit and purpose of the Donation Act, and contrary to the letter of the 8th Section of the Act, if not to the 4th Section also. It might be that Notification could be required in a case when it was sought to cut off the rights of third persons who had settled upon the land without knowledge of the prior claim; that is, that in order to defeat their claim notice, actual or constructive, must be shown. But the bill alleges that all the defendants and all the intermediate claimants all the way back to the Government, had, at all times, knowledge and notice of the rights of Scott and his wife, and their successors. So, if the claim of Mrs. Scott's successors, would be good as against the Government it is equally good as against the defendants.

Upon the foregoing considerations, I submit that the grant did take effect as to Mrs. Scott and her heirs; and if so, there is equity in the bill as to her half of the land; for the same grounds of equitable interposition apply to her half as heretofore shown to apply to her husband's half.

II. The next objection raised by demurrer is that the bill is multifarious. This is the ground of the *Third* and *Fourth* specifications of the demurrer (**Record, folio 26-27**). This objection is not well taken; for although the defendants hold

distinct parcels of the land in controversy, they all derive their claims of title from Perkins and the County, under and by virtue of the pretended titles which are attacked by the bill; while the complainants claim a common interest in all the land in dispute, based upon the settlement and residence of Lemuel Scott upon the entire tract; and their claim, if it prevail, must defeat those of all the defendants, since it overthrows the title on which they all rest. That such a bill is not open to the objection of multifariousness is well sustained.

Fellows vs *Fellows et al'*, 3 Cow.,682.

Oliver vs *Piatt*, 4 How., 333.

C. P. R. vs *Dyer, et al.*, 1 Sawyer, 641.

III. The Fifth specification in the demurrer (**Record, folio 27**) raises the question whether the suit is barred by the lapse of time, in that the suit was not commenced within five years after the date of the patent to the defendants; the *sixth, seventh* and *eighth* specifications (**Record folio 27**) are that the suit has not been commenced within twenty years from the time the alleged cause thereof arose; and the *ninth, tenth*, **Record, folio 27**), *eleventh* and *thirteenth* (**Record, folio 28**) specifications are that there has been such delay in bringing the suit as ought to be held by the Court to be fatal *laches*.

I have placed all these specifications under one head, be-

cause they all raise but one question, that is, the question of *laches*, the plea of the State statute of limitations being in no case a technical and peremptory bar to a suit in equity in the United States Courts; but the statutory time being merely the period beyond which Courts of Equity are accustomed in the exercise of their judicial discretion, to hold the delay fatal, in the absence of any special circumstances to excuse it.

Hall vs. Russell, 3 Sawyer, 506.

Story eq. Pl. § 756.

Story eq. Jur. § 529

By an Act of the Legislature of Oregon, passed October 22, 1870, (Gen. Laws of Oregon, page 189, § 378) it is provided that "no suit shall be maintained to cancel annul or otherwise affect a patent to lands issued by the United States or this state, or to compel any person claiming or holding under such patent to convey the lands described therein, or any portion of them, to the plaintiff in such suit, or to hold the same in trust for or to the use of and benefit of such plaintiff, for or on account of any matter, thing or transaction which was had, done, suffered or transpired prior to the date of such patent unless such suit is commenced within five years from the date of such patent, or within one year from the passage of this Act."

It is contended by the defendants that this statute is a bar to the complainants' suit, or, at least, that the failure to commence suit within five years from the time when the patent issued to the County of Yamhill (**Record, folio 7**) and within five years from the time the patent was prepared and signed by the proper officers of the United States to be

issued to the heirs of Joel Perkins and wife (**Record, folio 6**) ought to be held as such laches as to exclude the complainants from the benefit of their equities. The bill alleges (**Record, folio 2**) that at the date of the death of Mary Jane Scott, which happened on the 9th day of April, 1851, the complainants, Louisa J. Vance and Almedia Swan, were aged respectively five years and one year. By the laws of Oregon, females attain their majority at eighteen years, and the bill alleges (**Record, folio 1**) that they were both married as early as 1866, and have been married women ever since; so that Almedia Swan has been under legal disability from her birth to the present time, and Louisa J. Vance has been under the disability of coverture ever since the patent was issued to the County of Yamhill, which was after the year 1866, therefore, assuming that the "date of the patent" in the statute above referred to means the date when it was prepared to be issued, and allowing that the Court of Equity should adopt the statutory period of five years, the interest in the land which these two complainants inherited from their mother could still be recovered by them, because during the time of their disability the statute of limitations would not run against them.

The patent to the heirs of Joel Perkins and wife never has been issued unless it was, in legal contemplation, issued when it was prepared, though it was never delived or accepted, and while the government might still withold or cancel it. I am aware that it has been held in certain cases that the true date of a grant from the government, unlike that of a grant from one individual to another, is the date when the patent is ready to be delivered, not when it is in fact delivered; but these

cases, so far as I have examined them, have been cases in which the grantee sought to avoid some burden imposed upon him by the ownership of the land, as for example, to avoid taxation, while enjoying the benefit of the grant, and I submit that a different rule ought to obtain, and the rule should be as in cases of grants between individuals, that the date of delivery is the true date of the instrument, in a case like this in which the defendents seek to exclude a third person from asserting his rights against them by claiming the date of preparation for delivery to be the true date of an instrument which they have never accepted. But whatever the Court may hold upon that proposition, the fact that the patent has never been delivered, coupled with the other extraordinary circumstances of this case, and especially with the frauds by which the decision was obtained and upon which the patent is based, furnish an ample excuse for the delay; not only as to that part of the land which came to the complainants from their mother, but to all the rest. Certainly the complainants should not be held bound to know that the defendents claimed under a patent until it had been accepted. And the Court should be the less inclined to adopt and rigidly apply this limitation, in view of the fact that the statute itself is of recent date, is applicable only to a particular class of suits, and allows only five years which in all other suits and all actions at law concerning lands in the same state, the statutory period of limitation is twenty years.

But the defendants insist that the Complainants should be barred by the twenty years limitation, because their title if any they have, vested at the date of the passage of the Donation Act.

As to this defence, the complainant, Louisa J. Vance can reply that she was not of age until 1864, and the complainant Almedia Swan, that she was not of age until 1868; and Caroline Scott being three years of age in 1851 (**Record, folio 2**) and dying in 1864, (**Record, folio 7**), never attained her majority, so that as to her interest which descended to her father, Lemuel Scott, the period of limitation did not begin to run until her death; but this suit was begun December 24th, 1877, hence as to these three interests, being three-eighths of the entire tract, (Donation Act § 8) the limitation of twenty years would be no bar even upon its strictest application, and as to the other five-eighths the limitation ought not to be applied in a suit of equity, if indeed it could be applied in an action at law, because the contest involving the facts which constitute the cause of suit, was, within a period far less than twenay years before the commencement of this suit, pending in and undetermined by the Land Department of the the United States; and while so pending, Courts would entertain no proceedings arising out of these facts.

Moore vs *Fields* 1 Or., 317.

Nor ought a Court of equity to adopt in this case the statutory limitation of twenty years, because as the bill alleges, the proceedings of Perkins to deprive Scott and wife of the land in dispute, were founded upon fraud and falsehood (**Record, folio 5**) and a compromise agreement was obtained from Scott by fraud ((**Record, folio 3**) and was then fraudently used in the Land Office by Perkins, (**Record folio 4**) and the fraud therein was not discovered by Scott until after the fradulent purpose had been accomplished (**Record, folio 6**);

and afterwards a part of the evidence by which Scott was endeavoring to maintain his rights before the Land Department at Washington was suppressed (**Record folio 25**) and a decision was finally obtained in favor of Perkins, which was secured by a series of frauds extending from the initiation of Perkins' claim to the final decision by the Land Department on September 9th 1868. Under such circumstances a Court of equity will not allow the statutory limitation to be interposed to protect the party guilty of the fraud.

Badger vs *Badger* 2 Wall., 87.

IV. The 12th specification of the demurrer (**Record, folio 28**) is that the facts stated in the bill were cognizable in, and were determined by, the Land Department of the government. True the bill alleges that the facts were passed upon in the Land Department, as they had to be before the courts would take cognizance of the case.

Moore vs *Fields supra*..

But the decision of the Land Department does not conclude the Court from investigating the facts and relieving the injured parties from the frauds and injustice complained of.

Tate vs *Carney et al.*, 24 How. 357.

Lindsey vs *Hawes et al.*, 2 Black 554.

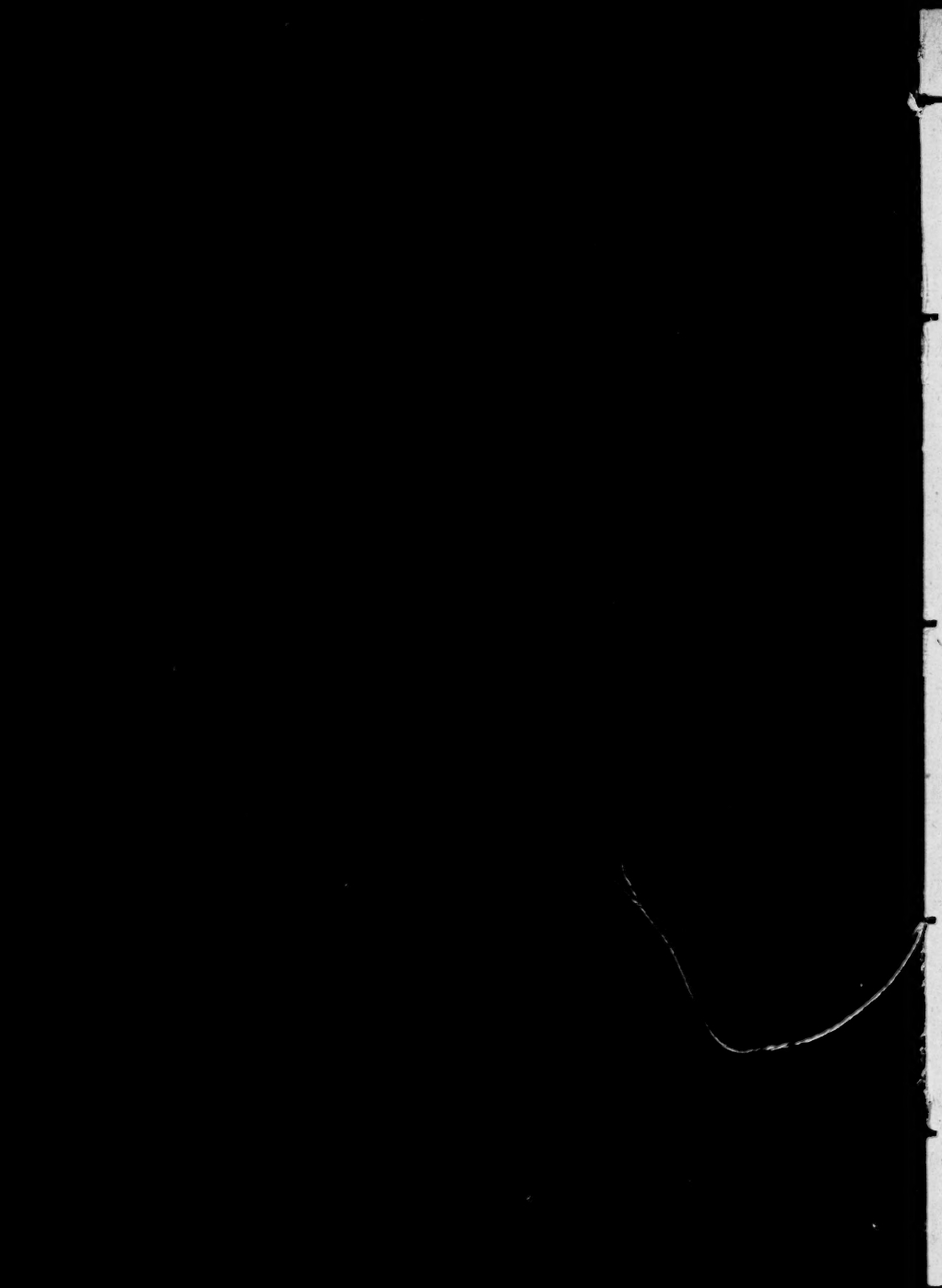
Johnson vs *Towsley*, 13 Wall., 72.

Warren vs *VanBrant*, 19 Wall., 646.

I respectfully submit that objections raised by the demurrer have all been answered upon well settled principles of law, and upon authority, and that the decree of the Circuit Court should be reversed and the defendants should be required to answer the bill.

W. LAIR HILL,

Counsel for Complainants.



IN THE

Supreme Court of United States.

No. 553.

JAMES VANCE ET AL,

VS.

A. R. BURBANK ET AL.

} *IN EQUITY.*

Reply of

W. LAIR HILL,

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At the outset of this reply, I am under the necessity of apologizing to the Court for numerous erasures, interlinitions and corrections with pen and ink, which the carelessness of the proof-reader of my former brief compelled me to make.

I have made all such corrections as seemed necessary to preserve the sense, leaving purely typographical errors, and faults in "making up" unnoticed.

I.

There is little in the brief and argument of respondents counsel which was not anticipated, and answered in the former brief of appellants, excepting some inaccuracies in the counsel's statement of facts. Some of these inaccuracies (which was no doubt made under a misapprehension and not intentionaly) being such as might, if allowed to pass without correction, influence the mind of the Court, deserve attention.

1st. It is said by the respondents at page 4 of their brief, that the decree dismissing the bill of Complainants "was based upon the joint and concurrent opinion of Judges Sawyer and Deady delivered from *the bench*." I can hardly suppose

that the " joint and concurrent opinion" of the Court below would in any case prevent this Court from reversing the decree, if this Court thought the opinion erroneous ; still I cannot but see that the concurrent opinion of two judges so eminent for learning and ability as Judges Sawyer and Deady, would, if fairly and directly brought before this Court, have no little influence upon the decision here.

The facts in regard to the action of the Court are these : The argument was heard on the demurrer before Judges Sawyer and Deady, and it was then stated from the bench that Judge Sawyer would take the papers in the case with him to San Francisco and would, after being sufficiently advised, decide upon the demurrer. After some weeks it was announced by Judge Deady that he had received directions from Judge Sawyer to dismiss the bill, which he did. No opinion was filed, nor was any opinion announced further than the remark that Judge Sawyer made the decision upon the authority of *Fitzpatrick vs. DuBois*. It had been understood all through the argument that the case would be brought to the Supreme Court, no matter which way the decision or the demurrer should go ; and it is apparent that Judge Sawyer having that idea in mind, gave it no further attention than merely to ascertain that it fell within the rule in *Fitzpatrick* vs *DuBois*.

The respondents say at page 11 of their brief, that the bill shows the Townsite Patent to have been issued "about 1866;" and at page 18 they say it is alleged to have been issued "*in*

1866." The allegation of the bill is that the townsite patent was issued "*sometime* AFTER *the year* 1866." (**Record, folio 7.**) This date is material only in connection with the date of the marriage of Louisa J. Vance, one of the Complainants; and as to her, only upon the question of limitation or laches. She was married *previous to* 1866; the Townsite Patent was issued AFTER that year.

Respondents say at page 30 of their brief:—

"In reply to the suggestion contained in brief of Appellants' counsel, on page 38 thereof, that Scott had not filed his notification prior to his wife's death, and "could not do it, because the Government had not extended the public surveys over the land," it may be remarked that by custom a large number of donation claims in Oregon were surveyed and notified on prior to the time when the public surveys were extended over the land; many of such surveys having been made under the laws of the "Provisional Government" [Art. 3, secs. 1, 2, 3, 5. *Barney* vs. *Dolph*, 7 Otto, 654.] And the Act of Congress of Sept 27, 1850, itself recognized those surveys (sec 7), and others that might be made subsequently and before the public surveys, sec. 6 and *provisoes* thereto. These early donation claims were not required to be taken, according to the public surveys, or by legal subdivisions"

I am surprised at these statements; I am surprised that counsel for respondents should have thought it necessary to their case to show that the Government recognized the settlement and claim of persons who had made their location and segregated their lands under the Provisional government; for that is exactly Complainant's ground, and a claim so located and segregated by Lemuel Scott is alleged in the bill to be the foundation of their claim. And I am even more surprised that counsel should, in reply to my statements of the impossi-

bility of Scott's making his notification before his wife's death, directly or by implication state, that any land claim in Oregon ever was notified on in the land office before the date of her death. The bill alleges Mrs Scott's death to have occurred *April* 9th, 1851; and it is a part of the public history of the Territory and of the administration of the Donation law, of which the Court takes notice, that there was no Surveyor General or other United States Land Officer in the Territory till *May* 15th, 1851, and that the land office was not opened for notifications till *February*, 15th 1852, *nearly a year after Mrs. Scott's death.*

By comparing the brief of respondents with the bill some other discrepancies will be found, but those above noted are the most important.

II.

As to the argument of counsel for respondents, little need be said now, as the matter of it was anticipated and discussed in the former brief of the appellants. One or two points, however, deserve mention.

The learned counsel opens, at page 6 of his brief, by saying that he will reserve the discussion of the questions presented by the *first* and *second* specifications of the demurrer—the point that there is no equity in the bill—till after the other and lesser questions have been disposed of; but, so far as concerns Lemuel Scott's half of the land claim in controversy, counsel *never returns to the question of whether there is equity in the bill.* The fact is, and the law is, that upon the statements in the bill no arguments can be made against the claim of the complainants to such of the land in dispute as came from Lemuel Scott as to his half of the donation claim. The de-

fense of *laches* is the only possible defense as to that part of the land.

As to Mrs. Scott's half of the land, that, I admit, turns on the question whether her right as a donee was defeated by her death before her husband did, or could, file a notification of the tract claimed, in the office of the Surveyor General—a question which was fully discussed in the former brief.

Fitzpatrick vs DuBois is the only case which is claimed to be directly in point on that question; and with great deference to the learning and ability of the Judge who decided that case—for whose decisions I always have a most profound respect—I submit that I have shown in the former brief that the decision is unsound on principle, and in conflict with other decisions rendered in the same court, and with the uniform decisions in the Supreme Court of the State, and contrary to the doctrines heretofore held by this court.

In support of the case of *Fitzpatrick vs. DuBois*, counsel cites *Langdeau vs. Hawes* (21 Wall. 521), which decides simply that a legislative recognition of a claim to land is the same in effect as a legislative grant of the land; and the case of *Rutherford vs. Greene's heirs* (2 Wheat. 196), where it was held that an act setting apart a certain tract of land to be given to certain persons, and another act providing for an allotment of a part of that land to General Greene, constituted together a legislative grant of the land to Greene and his heirs. Neither of these case touches, at any point, the question in *Fitzpatrick vs. DuBois.*

Upon the question of *laches*—which for the purpose of a suit in equity takes the place of the question of limitation

by lapse of time—counsel for respondents concedes that our position is correct, that the lapse of time is not a peremptory bar. The question then being whether the five years delay should cut off the right of complainants, I have only this to add to what I have already said : The five years is an unusually short time for such purpose ; the five years' act was a special act to apply to only one class of cases, while the general rule in the same state for actions and suits concerning land was twenty years. The legislature of the State has, since the filing of this bill, indicated its view, that the period was entirely too short by enacting in 1878, that in this class of cases the time should be ten years ; —and the U. S. Circuit Court, Judge Deady presiding, has recently adopted this latter period—ten years—as the more reasonable period.

The case referred to is *Stephens* vs. *Sharp*, in which counsel for the respondent in this case, was one of the counsel who argued the case, for the longer period.

Upon the other two subjects discussed in this case, the action of the Land Office and the question of multifariousness, the arguments of respondent were, I submit, answered in advance.

W. LAIR HILL,
Counsel for Complainants.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

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Appellants,

vs.

A. R. Burbank, Daniel Johnson, Thomas Heuston, Bartlett Whitlow, J. M. Belcher, M. J. Bird, R. P. Bird, John Bird, Jacob Grazier, J. L. Ferguson, H. Allison, J. J. Butler, E. C. Bradshaw, Hull Johnson, J. A. Campbell, Jesse Dixon, L. A. Dixon, J. W. Dunn, C. F. Royal, j. W. Watts, K. B. Mercer, Josiah Nelson, Robert Bird, W. F. Perkins, Geo. M. Perkins, G. W. Perkins, E. D. Perkins, A. H. Roberts, Matthew Patton, A. Frazer, Joseph Heuston, H. Hurley, and the County of Yamhill,

Appellees.

Brief and Argument of Solicitor for Appellees.

J. N. DOLPH, Solicitor for Appellees.

PORTLAND, OREGON:
A. G. WALLING, STEAM PRINTER AND BOOKBINDER.
1879.

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Appellees.

Brief and Argument of Solicitor for Appellees.

STATEMENT OF CASE.

This is an appeal from the decree of the Circuit Court of the United States for the District of Oregon, sustaining the

demurrer of Appellees to the amended bill of complaint of Appellants, a copy whereof appears in the printed record, which judgment was based upon the joint and concurrent opinion of Judges Sawyer and Deady delivered from the bench.

(For frame of bill see Record Folios 1 to 12 and 37 to 46 inclusive.)

THE DEMURRER.

The causes of demurrer, assigned to this bill, are in substance,

First—That the said complainants have not, by said bill, made such a case as entitles them in a court of equity to any relief from or against these defendants, or either of them, touching the matters contained in the said bill, or any of them.

Second—That it appears by said complainants' own showing, by their said bill of complaint, that said complainants are not entitled to the relief prayed for by their said bill against defendants, or either of them.

Third and *Fourth*—That the bill is multifarious.

Fifth—The statute of limitations of Oregon of five years.

Sixth—The Oregon statute of limitations of twenty years.

Seventh—That it appears from the bill that neither of complainants, nor their, nor either of their ancestors, predecessors, or grantors, or either of them, was seized or possessed of the premises in controversy, or any portion there-

of, within twenty years next before the commencement of this suit.

Eighth—That more than twenty years had elapsed prior to the commencement of this suit, since the execution of said agreement of August 23, 1853, and the matter constituting said alleged fraud was during all said time apparent upon the face of said written agreement.

Ninth—Laches appearing from the allegations of the bill.

Tenth—That the matter of said alleged fraud was easily ascertainable by Scott, and he had no right to rely upon said claimed misrepresentations.

Eleventh—That it does not appear from the bill but that complainants have been aware of said matters constituting said alleged fraud for many years past, and does appear that such matters are of a character to have been readily ascertained, for more than twenty years past.

Twelfth—That all the material facts and circumstances, constituting the gravamen of the complaint made by the bill, were properly cognizable and determinable by the General Land Office Department of the Government, and are shown by the bill to have been considered and passed upon by said department, and the same are not proper subjects of review in a Court of Equity.

Thirteenth—That the matters alleged in said amended bill to show action on the part of the Register and Receiver, and of the Land Department, aforesaid, unjustly prejudicial to the rights of the complainants in determining said opposing and conflicting claims to said lands, ap-

pear on the face of said bill to have been, and to be, of a character readily and easily ascertainable, by the exercise of reasonable diligence; and the circumstances relied upon in said amended bill to excuse the delay in complaining thereof, themselves show the complainants to be chargable with gross laches and inexcusable neglect, in not having sooner ascertained and complained thereof. [Record Folios 47 to 54, inclusive.]

ARGUMENT.

The *first* and *second* causes of demurrer being want of equity in the case presented by the bill, I reserve this portion of my argument until some of the subsequent causes shall have been first presented.

The *third* cause of demurrer is that the bill is multifarious. [Record Folio 49.]

Multifariousness can be more readily defined in general, than applied to particular cases in the light of authority. It appears, from the allegations of the bill in this case, that the defendants are neither each and all interested in the entire subject matter in dispute, nor in any principal question of law or fact affecting the title of all of them.

Some of the defendants are alleged to claim under the Townsite law, and not otherwise. [Record Folio 9.]

Others of them claim under the Perkins patent only—[Record Folio 7 and 8]; while others again claim under both the Townsite law and the Perkins patent: and each of these classes, as well as each defendant individually, claim separate parcels of land. [Record Folios 9 and 10.]

As there seems to be no identity of interest either in the

property claimed, or the principles involved, between the *first* and *second* of these classes, nor any such identity of interest between either of these classes and the *third* class in the property claimed, nor as to but one of the two titles emanating from Government under which said *third* class claim, this, it is believed, renders the bill obnoxious to the objection of being multifarious.

Sto. Eq. Pl., secs. 271, 272.

LIMITATIONS.

By the fifth, sixth, seventh and eighth causes of demurrer, it is alleged that the bill shows upon its face that the claim of complainants is barred by the statute of limitations of Oregon. [Record Folio 51.]

The statutes of limitations in force in Oregon, which are relied on in the demurrer, read as follows:—

Title 2, chap. 1.

"Sec. 3. Actions at law shall only be commenced within the periods, prescribed in this title, after the cause of action shall have accrued. * * * *

Sec. 4. The periods prescribed in the preceding section for the commencement of actions, shall be as follows:

Within twenty years:

FIRST. Actions for the recovery of real property, or for the recovery of the possession thereof; and no action shall be maintained for such recovery, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seized or possessed of the premises in question within twen-

ty years before the commencement of the action." *General Laws of Oregon*, 1843-1872, compiled by Deady and Lane—Title 2, chap. 1, Civil Code.

"Sec. 17. If person entitled to bring an action mentioned in this title, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be, at the time the cause of action accrued, either:

FIRST. Within the age of twenty-one years or * * *

FOURTH. A married woman;

The time of such disability shall not be a part of the time limited for the commencement of the action," &c.

Ib. sec. 17, page 108.

"Sec. 378. A suit shall only be commenced, within the time limited to commence an action, as provided in Title 2 of chap. 1, of this code; and a suit for the determination of any right or claim to, or interest in real property, shall be deemed, within the limitation provided for actions, for the recovery of the possession of real property; but no suit shall be maintained to set aside, cancel, annul, or otherwise affect a patent to lands issued by the United States or this State, or to compel any person claiming or holding under such patent to convey the lands described therein, or any portion of them to the plaintiff in such suit, or to hold the same in trust for, or to the use and benefit of such plaintiff for or on account of any matter, thing or transaction, which was had, done, suffered, or transpired, prior to the date of such patent, unless such suit is commenced within five years from the date of such patent, or within one

year from the passage of this act. In a suit on a new promise, fraud or mistake, the limitation shall only be deemed to commence from the making of the new promise, or the discovery of the fraud or mistake.

Id. Sec. 378, page 189.

It will be observed that the statute last cited contains no saving clause in favor of minors or married women, but is general in its application to all classes of persons, without distinction; and it is a proposition so familiar as not to require the citation of authority, that where the legislature makes no such exceptions the courts can make none. Of course I am aware of the rule that courts of equity are not ordinarily bound by statutes of limitation, as courts of law are, but only give effect to their provisions in proper cases, in analogy to the rules governing courts of law.

In the case of *Hall* vs. *Russell*, (3 Sawyer, 506) the Circuit Court of the United States for the District of Oregon, while holding that it was not bound by said statute of five years, yet gave effect to it in that case—the court saying:

"An action at law to recover possession of this property would not be barred by the laws of this State under twenty years. Whether the court shall follow that statute or the limitation of five years, contained in section 378, *supra*, is the question. It is conceded that, in a case of equitable cognizance like this, the court is not bound by the statute of limitations, but may, for good reasons, apply a longer or a shorter time in bar of a suit. There is nothing in the circumstances of this case or the period fixed by the statute which requires the court to lengthen the term, but rather the contrary.

"The patent was issued nearly ten years ago. The limitation of five years upon a suit of this kind in the State court was enacted on October 22, 1870, and took effect January 24, 1871, nearly five years before the commencement of this suit, October 2, 1875.

"No reason is given for the delay; nor does it appear that the plaintiffs have been deceived or misled in any way by the defendants, or in anywise induced to forbear the assertion of their alleged rights. There never was any actual relation of trust or confidence between these parties. They claim under titles adverse in their origin, and have always occupied the attitude of adverse claimants. Under these circumstances we think that the court ought to apply the shorter limitation of the two. Statutes of limitation are measures of public policy and expediency, and it is desirable that the rule should be the same in the national and State courts. We think that in this case the court may safely adopt the limitation prescribed by the laws of the State in its courts in like cases." [Page 516.]

These remarks are peculiarly applicable to the case at bar. It is stated in the bill that Scott settled upon the land in controversy in 1848, and claims to date his settlement from July 20 of that year—[Record Folio 1]; and that on October 9, 1852, [Folio 2] he notified the Surveyor General of his claim to 640 acres of land, including the land in dispute, as a settler under the provisions of the *fourth* section of the Act of Congress, approved September 27th, 1850, commonly called the "Donation Law." That on the day previous (October 8, 1852) Joel Perkins had notified the Surveyor General of his claim as a settler under the same section of the law to 640 acres of land within the limits of which was likewise included the disputed tract of

land. [Rec. Fol. 2.] The bill in this cause was filed Dec. 24, 1877. [Record Folio 11.] Thus it will be seen that this controversy began at least twenty-five years before this suit was commenced. The written agreement as to the dividing line agreed upon in the proposed compromise of this dispute between Perkins and Scott, and in the drafting of which it is claimed that the former practiced a fraud on the latter, was executed by them on August 23, 1853. [Record Folio 3.] The alleged fraud is said to have consisted in Perkins locating said line at a different place on the land, by the description contained in the writing, than had been agreed upon by the parties when upon the land—whereby Perkins gained advantage to the extent of the 90 acres of land in dispute. [Folios 3–4.] The alleged fraud, then, was of a character readily discoverable by the exercise of a very moderate degree of prudence and diligence on Scott's part.

It is virtually admitted in the bill that Scott discovered this alleged fraud as early as 1855; the allegation being that he did not discover it until "soon after" the 2d day of March, 1855; on which day it is alleged that Scott filed with the Surveyor General, and Register and Receiver, his protest against the granting of a donation certificate to Perkins upon the land claimed by him. [Record Folio 6.]

It is also alleged that patent issued to Perkins' heirs on March 14, 1872, for the 640 acres so notified on by him, [Record Folio 6] and that a patent issued to Yamhill county for the town-site tract about 1866. [Record Fol. 7.] It also is alleged that at the time the county commissioners applied to enter the town-site tract, (April 19, 1858) Scott and Perkins' heirs were notified to make their contest. [Record Folio 40.]

It furthermore appears from the bill that, after this contest was decided, Scott procured an order from the Commissioner of the General Land Office, to the Register and Receiver, to open up the decision and rehear the whole matter, which was done; and the former decision being adhered to, an appeal was taken to the Commissioner, who affirmed said decision; and that an appeal was then taken to the Secretary of the Interior, who affirmed the decision of the Commissioner, Sept. 9, 1868. [Rec. Fol. 41-47.]

It likewise appears that in May, 1850, Perkins conveyed to the Board of County Commissioners that part of the land afterwards patented to the county as a town-site, under the law of 1844—and that a town has, in the meantime, grown upon the town-site tract, and that a large number of these defts. are claiming town lots thereon. [Rec. Fol. 37-89.[

But it is claimed that the statements in the bill, that when the mother of complainants Louisa and Almedia died April 9, 1851, the former was five years and the latter one year of age, [Record Folio 2]; and that both of them married prior to 1866, [Record Folio 1] should, on the ground of disability, relieve them from the effect of either of said statutes, or the charge of laches.

By statute of Oregon, October 11, 1864, it was and is provided "that in this State male persons shall be deemed to have arrived at majority at the age of twenty-one years, and females at the age of eighteen years, and thereafter shall have control of their own actions and business, have all the rights and be subject to all the liabilities of citizens of full age." [Sec. 75, p. 564, General Laws.]

It is alleged in the bill that Scott, by his deed of Oct. 15, 1877, conveyed all his interest in the land in dispute to

his said daughters, Louisa and Almedia, [Record Folio 7] and that at the death of his wife, Mary Jane Scott, their mother, on April 9, 1851, she left three children, one of whom (Caroline) has since died intestate, leaving her father her sole heir at law. [Record Folios 2 and 7.]

By Section 4 of the Donation Law, it is provided that if either the settler or his wife die before patent shall have issued, "the survivor and children or heirs of the deceased shall be entitled to the share or interest of the deceased in equal proportions."

On the death of the wife then, Scott and the three children succeeded to her interest, if any she had, in equal proportions—one-fourth to each; and Scott afterward, in 1864, succeeded to Caroline's share, so that if he conveyed anything to complainants, it was a one-half interest in his wife's alleged land.

All pleadings are to be construed most strongly against the pleader, and Louisa being alleged to have been five years old in 1851, was eighteen years old in 1864, and it does not appear that she was then married.

Neither Louisa, nor Almedia, could take any better right under their father's deed, than he himself had at its date.

If Scott himself were complainant here, I apprehend there could be no doubt but that the court would apply the effect of one or both said Statutes of Limitation against him; or, at least, would hold him to have been guilty of gross laches in the prosecution of his suit.

I, therefore, submit that, at all events, these statutes

ought to be applied, and the rules as to laches should be enforced, against complainant Louisa Vance as to her entire claim, both individually and as grantee from her father; and against Almedia as to the interest claimed by her as grantee under her father.

As to the share claimed by Almedia through her mother, or under the statute as one of the surviving children of Mary Jane Scott, I further submit that applying the doctrine referred to in *Hall* vs. *Russell, supra,* that the court "may, for good reason, apply a longer, or a shorter time in bar of a suit" than is prescribed by the Statute of Limitations, the demurrer ought to be sustained on this ground.

With proper deference I suggest whether the court did not overlook the case of Clarke vs. Boorman's Ex., 13 Wall. 505, when it remarked in Hall vs. Russell, on page 515: "The statutes of limitation of the several States are made the rules of decision in the United States courts in trials at common law. Now, thereby, these statutes become practically laws of the United States, and the national courts sitting in equity follow them as laws of their own forum, or jurisdiction. But the limitation here invoked as a bar to this suit is no part of the laws of the United States. By its terms it only applies to suits in equity in the courts of the State. Therefore, it does not come within the purview of Section 721, R. S., *nor become in any sense the law of this forum.* Our attention has not been called to another like it or to any authority directly bearing upon it."

In the case of Clarke vs. Boorman's Ex., 18 Wall 505, this honorable court said, "Whether we look to the statutes of limitations of the State of New York, governing such cases

in that state. *and of course in this court*, or to the more general and universal doctrines of courts of equity on the subject of the lapse of time, laches and stale demands, we are of the opinion that this suit cannot be maintained."

The limitation prescribed by the statutes of New York for the recovery of real estate, is twenty years in an action at law.

When there is a concurrent jurisdiction in the courts of common law and in courts of equity, the limitations prescribed by the court of law shall govern the court of equity.

Bills for relief in cases of trust, *not cognizable by courts of law*, are to be filed within ten years after the cause of action accrued.

Bills for relief on the ground of fraud, must be filed within six years after the discovery of the fraud.

If this were a suit to recover the real estate devised by the testator, the action would be barred at law by the statute, because the right of action of the plaintiff's ancestor, George Clarke, accrued upon the death of his mother, in 1847, and this suit was commenced in 1869, more than twenty years afterwards.

The bill of complaint does, in terms, ask this relief, that is, the possession of the property; and although this is impossible, because the property has passed beyond the control of the defendants, it would seem reasonable that when the plaintiffs ask, in the alternative, for such relief as the court can give instead of the property, the same rule of limitation should govern the courts of equity as should gov-

ern the courts of law; and such is the express declaration of the New York statute as regards concurrent remedies in courts of law and chancery.

But, as we have already shown, this is a bill for relief, if any relief can be granted, in a case of trust *not cognizable in a court of law*, it is not for land in possession of the defendant, nor for money in his possession received for the use of the plaintiff's ancestor, nor for such money which ought to be in his possessson, but it is for a well-defined violation of trust by which the plaintiff's ancestor lost the title to the property which would otherwise have come to him on the death of his mother, and in failing to secure to him his reversionary interest, when they conveyed it as trustees. It is, therefore, a case falling within the limitation of *ten* years of the New York statute, because it is a bill for relief in a case of trust not cognizable at law.

It is insisted, however, that in cases of fraudulent violation of trust, no length of time will operate as a bar to a suit in equity; and some general expressions found in the language of the courts are much relied on.

These authorities are all based upon the proposition of actual intentional fraud practiced upon a *cestui que trust* by his trustee. We have already said such is not the case before us.

The statute we have referred to as *governing this case* makes no such exception, though it is, in terms, applicable alone to cases of trust and *to suits in equity*.

This decision would seem to have escaped the observation, and accustomed painstaking and exhaustive research of the learned judge, who rendered the opinion of the

court in the case of *Hall* vs. *Russell*, for, unless I have failed to comprehend the language of the court it is clearly announced in the foregoing decision, that the Statute of Limitations of a State prescribing the time within which suits in equity shall be brought, in cases not within the concurrent jurisdiction of courts of law, govern the courts of the United States in their decisions, as thoroughly as do the statutes of limitation of the States in causes falling within the concurrent jurisdiction of courts of law and equity.

See also *Cleveland Ins. Co.* vs. *Reed*, 1 Bissell, 184.

Angel on Limitations, page 22, sec. 26, and note 2, and decisions of this honorable court there cited.

LACHES.

The ninth, tenth, eleventh and twelth causes of demurrer are based upon the ground that it appears, from the allegations of the bill, that complainants have been guilty of *laches*, in asserting their pretended claim; and that, therefore, a court of equity will refuse its aid, and leave the parties to their rights at law, if any they have. [Record Folio 52.]

The statement of facts and dates above extracted from the bill, in connection with the discussion of the question of the effect of the Statutes of Limitations upon the rights of complainants, are entitled to equal weight in the consideration of the question of laches.

"But where the jurisdiction is peculiarly equitable * * * and in all cases of equitable titles to real estate, courts of

equity will apply the period of limitation of legal estates of an analogous character. * * * But equity will often treat a lapse of a less period as a presumptive bar, on the ground of discouraging stale claims, or gross laches, or unexplained acquiescence in the assertion of an adverse right."

2 Story's eq. jur.; sec. 1520.

Now, as already stated, it appears, from the bill, that this controversy between Scott and Perkins, as to the right to the land in dispute, began as early as 1848, nearly thirty years prior to the commencement of this suit, for Scott, on Oct. 9, 1852, presented to the Surveyor General his claimed proofs of four years prior residence and cultivation upon the land. And in May, 1850, Perkins assumed to own the right to the land, for he then executed his deed to the County Commissioners of Yamhill county for that portion of the land now in dispute, called the Townsite tract. It likewise appears that the town of Lafayette, which, I suppose this court judicially knows, is the county-seat of Yamhill county, has meanwhile grown up on said townsite tract; and a majority of these defendants are claiming lots and blocks in said town.

These circumstances (taken in connection with the further facts that it does not appear but that Louisa J. Vance was of lawful age before she married, and that both complainants claim one-half of their interest through their father, by deed of Oct. 11, 1877, thus placing themselves in his shoes as to so much, and that the patent to the county was issued in 1866, and the patent to Perkins heirs in March, 1872, and the further fact that by the law of Oregon of Oct. 11, 1862, it is provided that:

"When a married woman is a party, her husband shall

be joined with her, except that when the action affects her separate property she may sue alone," [Civil Code page 110; sec. 30] and that the constitution of Oregon provides that: "The property and pecuniary rights of every married woman, at the time of marriage, or afterwards acquired by gift, devise, or inheritance, shall not be subject to the debts or contracts of the husband,"

See Laws of Oregon, *supra* page 95, sec. 5),

Should, I submit, induce the courts to apply the rule as to discouraging stale claims against complainants.

See also—

Wagner vs. *Baird*, 7 How., 258.

Stearns vs. *Page*, 7 How., 829-831.

Piatt vs. *Vattier*, 9 Pet., 416-17.

Sullivan vs. *Portland & Kennebec R. R. Co.*, 4 Otto., 806.

Murphy vs. *Paynter*, 1 Dillon, C. C. R., 333.

Brown vs. *Buena Vista County*, 5 Otto., 160.

The remarks of the court in the case, (Ambler 645, quoted and approved by this court, in *Sullivan* vs. *Portland R. R. Co.*, *supra*), seem to be entirely applicable to facts of the case at bar:

"A court of equity, which is never active in giving relief

against conscience or public convenience, has always refused its aid to stale demands where a party has slept upon his rights, and acquiesced for a great length of time. Nothing can call forth this court into activity, but conscience, good faith and reasonable diligence. Where these are wanting, the court is passive and does nothing. Laches and neglect are always discountenanced; and, therefore, from the beginning of this jurisdiction, there was always a limitation to suits in this court."

As already shown by reference to the bill as contained in the record, this controversy began as early as 1848, within about two years after the treaty with Great Britain of June 15, 1846, by which the claim of the U. S. to the Territory of Oregon was settled. That Perkins, on Oct. 8, 1852, filed his notification upon 640 acres of land, including the 90 acres in controversy; and that on Oct. 9, 1852, Scott filed his notification upon 640 acres also, including said 90 acres—and from that time until Scott was finally defeated in the Land Department by the decision of the Secretary of the Interior, Sept. 9, 1868, he was contending for the land in dispute. And now, after a slumber of over nine years, this bill is filed Dec. 24, 1877, with intent to renew, if possible, in the courts, the unconscionable and vexatious assertion of his pretended claim, without foundation in right.

In the meantime the land in dispute, which was comparatively worthless in 1848, has become the site of a town—the county-seat of the county and has passed into the hands of third parties. Perkins, the patentee, and presumably other important witnesses to the transactions, are dead, for as said by this court in *Brown* vs. *Buena Vista Co.*, *supra*, "the lapse of time carries with it, the memory and life of

witnesses, the muniments of evidence, and other means of proof."

It seems to me that a claimant for these lands, under such circumstances, in a court of equity, should show greater diligence than is shown by the bill in this cause.

DELIVERY OF PATENT.

It is alleged in this bill that the Perkins patent "has not been delivered to the said patentees, nor to any person or persons claiming said lands, but remains still in the hands of the officers of the Land-office of the United States, and undelivered." [Record Folio 6.]

I reply to this that it has been repeatedly held that a patent from the Government takes effect from the date of its issue, and that delivery is not essential here as in the case of private conveyances.

Miller vs. *Ellis*, 51 Cal., 74.

Donner vs. *Palmer*, 31 Cal., 500.

Le Roy vs. *Clayton*, 2 Sawyer, 493.

Lott vs. *Proudhomme*, 3 Rob., La., Rep., 293.

Lavergne's heirs vs. *Elkin's, heirs*, 17 La. O. S., 220.

It is not alleged that the officers of the land-office refuse to deliver the Perkins patent, but it appears, by a fair con-

struction of the allegations of the bill, that (Perkins being dead and the lands having passed from his heirs to numerous claimants), there has been a failure to take it from the local land-office. [Record Folio 6.]

MARY JANE SCOTT'S HEIRS.

But a more serious question yet remains, to which the first and second causes of demurrer are addressed, striking at the very root and foundation of the claim of complainants. That is, as Mary Jane Scott died April 9, 1851, and Lemuel Scott, her husband, did not notify upon the land until October 9, 1852; [Record Folio 2] could he then notify as a married man on 640 acres of land? Did he become known to the law as a *settler* under its provisions until he *notified* as such? and, being then a single man, could he claim more than 320 acres of land, because he had a wife living at the time of the passage of the Donation law?

These questions were answered negatively in the case of *Fitzpatrick* vs. *Du Bois*, 2 Sawyer, 434; and that decision was reaffirmed by the same court on the argument of this demurrer below. In that case the court said:

"In *Fields* vs. *Squires*, 1 Deady, 377, it was held that:

"The settlement of a married man is intended for the benefit of his wife, as well as himself, to enable her to obtain her equal share of the bounty of the grantor. A married man may occupy less land than the law permits. He may have good reasons for so doing. A particular half section may be deemed of more value than any whole one open to settlement. In this respect the act commits the interest of the wife to the judgment and thrift of the hus-

band. But he cannot change the law, and elect to take as a single man to the exclusion of his wife. The exclusive power of the husband is confined to the selection and location of the land. In any event, the land embraced in the settlement whether a whole section or less, is granted to the husband and wife in 'equal parts.'

Mere indefinite occupancy of the public lands did not constitute any one 'a settler,' nor make a 'settlement' thereon under the Donation act. Such occupation must be upon a particular tract having the form or boundaries required by the act, and with the intent to acquire the same. Neither did residence and cultivation, however, commenced or prolonged, bring a party within the purview of the act, so as to vest in him any estate or interest in the land. Notice to the surveyor-general of 'the precise tract claimed' was the first act, which brought the occupant within the operation of the law. By this means he signified his intention to avail himself of the benefits of the act, and his acceptance of the proffered grant. Thereafter, but not before, the grant was located and confined to the land described in the notification, unless as was the practice, the settler had leave to withdraw his notification and abandon that location.

This notification by the occupant was what constituted him 'a settler,' and his occupation thereby became 'a settlement' under the act as well as in fact. Doubtless, it should be held to relate back to the beginning of his occupation, or to the passage of the act, when the occupation commenced prior thereto. But without this notification, the occupant could never acquire any legal relation to the land, or the government be deprived of its ownership thereof.

* * * * * *

But here the grantee is not named, otherwise than as one of a particular class of persons who may take, and the selection and notice to the grantor of the precise tract claimed depended upon the former, and involved in fact his acceptance of the proffered grant. It follows from these premises that the act of notification is a condition precedent to the vesting in the occupant of any estate or interest in the land.

Apply this conclusion to the case at bar. On June 9, 1852, when Andrew was divorced from Josette, he was a mere occupant of the public lands. Whether he should become 'a settler' thereon, and a donee under the act, of the land occupied by him, depended upon his election to notify thereon within the time limited by the act; Josette could not compel him to notify, nor while she was his wife could she receive a donation, otherwise than through her husband's acceptance of the proposed grant. But before he notified, he had ceased to be a married man, and she was no longer his wife. He was only entitled thereafter to take as a single man. * * * * *

Although as a matter of fact, DuBois did notify as a married man upon the whole section, he had no right to do so, and was finally held by the land department to be a single man, and allowed a donation accordingly."

It seems to me that this reasoning of Judge Deady, which, I understand to have been fully endorsed by Judge Sawyer in the case at bar, is unanswerable, and conclusive of the main question in the case now before this court. Scott was a single man, and entitled to but 320 acres of land, when, on Oct. 9, 1852, just 18 months after his wife's death, he attempted to notify, as a *married man*, upon 640 acres of

land. Until he did file his notification, he was a mere occupant of the public land, and was unknown to the law as 'a settler' thereon. If he might *then* notify as a married man, because his wife was living at the date of the passage of the Donation act, no sound reason is perceived why he might not, with equal propriety, have asserted the same right many years, instead of *months*, after his wife's death, provided the notification was within 3 months after survey made. Both the land department and the court below have decided against such pretended right; and I submit that those decisions are sustained by analogous constructions of the Donation law in other cases.

Fields vs. *Squires*, 1 Deady, 377.

Vandolf vs. *Otis*, 1 Oregon, Rep., 153.

The death of Mrs. Scott was, doubtless, in many respects an unfortunate occurrence, so far as her husband and children were concerned, but the courts can no more relieve them from the legal results, than from the fact of her death.

Counsel for appellant places much stress upon the proposition that the grant made by the Donation Act took effect *in presenti*, and, to support the proposition, cites several cases decided in the Circuit Court of the United States for the District of Oregon, and in the Supreme Court of the State, and claims that the decision in the case of *Fitzpatrick* vs. *DuBois* is in conflict with these decisions; but with all due deference to counsel, I do not understand that there is any such conflict.

In the case of *Chapman* vs. *School District* (Deady's Reports on page 113) the court says: "The Donation Law is

a grant in the present, and gives the fee simple to every settler *who avails himself of its provisions from the date of his settlement.* [*Lessuer* et al. vs. *Price*, 12 How., 76; 11 Opin., 29.]"

In the case of *Lamb* vs. *Davenport* (1 Sawyer, 632) speaking to this point, the court says: "Besides, under the Donation Law, Lownsdale was seized of an estate in fee, *if entitled to a patent at all*, from at least the date of the Act, if not by relation from the date of his settlement." It is manifest that here the word "settlement" is used as synonymous with "occupation," as used by Judge Deady in *Fitzpatrick* vs. *Du Bois*. Lownsdale must have notified to become entitled to a patent at all, and to become a settler within the meaning of the Act of Congress; but when he complied with the conditions *subsequent to his notification and acceptance of the donation*, his title related back to the commencement of his residence and cultivation, or to the passage of the Act.

But suppose Lownsdale, although an occupant of the public lands, and in popular acceptation a settler upon the tract of land occupied by him, had refused to avail himself of the bounty of the Government and to notify upon the tract occupied by him, would he have taken the grant in fee against his will, and then have lost it by failing to perform conditions which he never undertook nor intended to perform?

I suppose the grant made by the 4th section of that Act to persons who should declare their intention to become citizens of the United States on or before the first day of December, 1851, and to persons who should become residents of the Territory on or before the first day of December

1850, and of 640 acres of land to unmarried settlers who should become married within one year from December 1, 1850, and the grant made by the fifth section of the Act to persons who should emigrate to Oregon and become settlers of the Territory between the first day of December, 1850, and the first day of December, 1853, were all of the same character as the grant to persons already occupying the public lands—at least, the courts, to my knowledge, have never made any distinction between them. Conceding that these grants were grants *in presenti*, what was granted?

I answer in the language of this court, in *Langdeau* vs. *Hanes* (21 Wall. 550) where, after declaring that "A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectually as a *grant (in presenti)* or quit claim from the Government."

The court proceeds to remark: "If the claim be to land with defined boundaries, or capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of that title. If the claim be to quantity, (as 640 acres to every married settler,) and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation will *then* immediately *attach the title to the land segregated.* * * * If the grant was of a certain quantity of land then undefined and incapable of identification, the title became perfect when the quantity was segregated by the survey made." [See also *Rutherford* vs. *Greene's Heirs*, 2 Wheaton, 196-]

So, here the grantee, to avail himself of the grant, must declare his intention to become a citizen, marry, or emigrate to the Territory, as the case might be; and in order

to become *known to the law* as a "settler," or one of the class of persons entitled to the benefits of the grant, must not only occupy the public domain, but, as "the grant was of a certain quantity of land then undefined and incapable of identification," must, in order to "perfect" his title and have it "attach," segregate the same, by survey, from the general domain, and notify the Surveyor General of the precise tract claimed.

Thus, by the provisions of sec. 4 of the Act of Sept. 27, 1850, there was granted, *in presenti*, to each white male citizen of the United States, being then an occupant of the public lands in Oregon, if a married man, a *quantity* not to exceed 640 acres of land—one half to himself, and the other half to his wife, to be held by her in her own right; which grant should attach to such specific parcel of land as he might select, cause to be surveyed, and file his notification upon, *during her wifeship*, for their *joint* benefit. This grant might, or it might never, attach to any definite tract of land, so as to invest a particular husband and wife, then occupying the public lands in Oregon, with the title to such tract. It gave them no title to the particular land they might then be occupying—for the husband could, if he chose, select an entirely different parcel of land and take that instead. It did not *vest* them with *title* even in 640 acres, for the husband might select and notify upon a smaller parcel if he preferred it, one-half of which smaller tract would inure to the wife; or he might fail to notify on any land, in which case, neither he nor she would derive any benefit from the grant. And by parity of reasoning, and of necessity, as it would seem, if he failed to notify until after his wife's death, as the grant did not attach to the particular land occupied in her lifetime, nor until notification filed, he could then be entitled to have the grant

attach to only so much land as he might lawfully take as a single man.

Nor is it difficult to foresee to what confusion a departure from the principle established by the decisions last cited, in favor of that contended for by counsel for appellants, would necessarily lead. The settler who had a wife living at the date of the Act, but who became a widower before notifying, and who therefore, as a single man, laid claim to 320 acres only, must now be found to have taken one-half thereof for the benefit of the heirs of his deceased wife, who consequently are tenants in common, to that extent, with the husband or his vendees. For it is held that the wife, if entitled at all, takes half the land embraced in the notification, regardless of quantity.

Fields vs. *Squires*, 1 Deady, 376.

Carter vs. *Chapman*, 2 Oregon, 95.

Or, suppose the husband whose wife was living with him on a particular tract of land at the date of the passage of the law, should after her death change his residence, and notify on a different piece of land, as it has been held he had a perfect right to do, [1 Deady, 360] in which tract, if in either, would the heirs of the deceased wife have an interest? It is not perceived how they could claim a share in the land on which the husband had never resided prior to the death of the wife; nor yet, how they could assert an interest in land upon which the husband and wife had resided, but on which he did not notify.

Again, if a wife living at the date of the passage of the law shall have died, and the husband have married a second time, before filing his notification as a married man upon the tract which he had so occupied in the lifetime of each wife: Are the heirs of the first wife, or is the second wife, entitled to half the land so taken? I suppose the courts would undoubtedly decide in favor of the last wife; and if so, that disposes of the question under discussion.

In reply to the suggestion contained in brief of Appellants' counsel, on page 38 thereof, that Scott had not filed his notification prior to his wife's death, and "could not do it, because the Government had not extended the public surveys over the land," it may be remarked that by custom a large number of donation claims in Oregon were surveyed and notified on prior to the time when the public surveys were extended over the land; many of such surveys having been made under the laws of the "Provisional Government" [Art. 3, secs. 1, 2, 3, 5. *Barney* vs. *Dolph*, 7 Otto., 654.] And the Act of Congress of Sept. 27, 1850, itself recognized those surveys (sec. 7), and others that might be made subsequently and before the public surveys, sec. 6 and *provisoes* thereto. These early donation claims were not required to be taken, according to the public surveys, or by legal subdivisions.

The requirement of Sec. 6 that the settler *should* notify within three months, after public survey made, did not prevent him from notifying at an earlier date. And that Congress so understood the matter appears evident from the provision of Sec. 6 of the Act of Feb. 14, 1853, requiring all persons entitled to land under Sec. 4 of the Act of September 27, 1850, to notify the surveyor-general of the particular land claimed, "in advance of the time when the public surveys should be extended over the same."

DECISIONS OF THE LAND DEPARTMENT.

It has been repeatedly held that the decisions of the land department, upon questions of fact affecting the rights of parties before it, are binding and conclusive, unless it can be shown that fraud or mistake intervened to preclude the officers of that department from fairly understanding and determining the claims of the respective contestants. Now it appears, from the allegations of the bill that every officer of the land department, from the lowest to the highest, decided, from the evidence before them, that Perkins, who first notified upon the land in dispute, was in fact the person entitled thereto by residence and cultivation.

Complainants evidently designed to fortify against the effect of this proposition upon their case, when, in the bill, they allege that, at the rehearing granted Scott before the Register and Receiver, Perkins, in addition to the alleged false affidavits of final proof of residence and cultivation theretofore filed by him, produced other false and fraudulent testimony in their support; and that, on appeal to the Commissioner, a portion of the evidence taken was not sent up, and so Scott was deprived of the benefit thereof before that officer, and also before the Secretary of the Interior, on further appeal to that officer. [Record Folios 41 to 46.]

Upon inspecting the bill, it will be seen that the decision of the Register and Receiver was rendered Feb. 1, 1862, [Record Folio 42] was affirmed by the Commissioner March 2, 1866, [Record Folio 45] and again reaffirmed by the Secretary Sept. 9, 1868; [Record Folio 46] so that more than six years intervened, within which, time and op-

portunity were afforded to discover the alleged failure to send up all the evidence, to say nothing of the fact that it is not alleged why Scott did not show the falsity of Perkins' evidence before the Register and Receiver.

A very lame attempt is made to excuse this laches, and borrow probability of merit for this cause by the allegation that the war so disturbed the business of the country, and of the departments, as to prevent Scott from obtaining a fair hearing and consideration of his claims. But, I apprehend, that after all the opportunities afforded him in that direction, as admitted in the bill, and when, as is therein shown, Perkins has been dead for a number of years, and perhaps many of his witnesses also, this honorable court will be slow to reverse the judgment of the court below, in order to open up, under such circumstances, a flood-tide of vexatious litigation against so many titles evidently acquired in good faith by defendants, relying upon those land-office decisions.

Wilcox vs. *Jackson*, 13 Pet., 498.

3 Op., Atty Genl., 93, 104, 664.

Robbins vs. *Bunn*, 5 Am. Rep., 76.

Hosmer vs. *Wallace*, 47 Cal., 461.

Ruttege vs. *Murphy*, 51 Cal., 388.

Johnson vs. *Tousley*, 13 Wall., 73.

Warren vs. *Van Brunt*, 19 Wall., 646.

I furthermore submit that had complainants, Louisa and Almedia, been of lawful age, and unmarried, at the time these contests originated, or were under progress in the land office, they had no right to be represented as parties thereto, and, therefore, cannot claim to have been prejudiced or deprived of any right by reason of infancy or coverture.

They were as much dependent as was the "wife," their mother, upon the acts and diligence of the husband and father, in establishing a right before the department to a grant of land to him as a married man, and to the particular land, which he should take. And if he failed wilfully, or through laches, or even as the result of fraud practiced upon him, to obtain such grant, the children, in right of their mother, might, ~~like herself~~ if she were, be entitled to divide with him what he did get; but surely they, no more than the wife, could assert a claim, either before the department or the courts to more land, than might be embraced in his donation certificate. That was a battle which he alone could fight; and the law, in this instance as in most others, has left the wife and children to rely upon the tact, energy and judgment of the husband and father for what of this world's goods they may obtain.

I, therefore, respectfully ask an affirmance of the decree of the court below in this cause.

J. N. DOLPH,

Solicitor for Appellees.